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**Protecting Indigenous Identities: Struggles & Strategies
Under International & Comparative Law**

**NATIVE HAWAIIANS AND THE LAW: STRUGGLING WITH
THE HE'E**

Melody Kapilialoha MacKenzie*

I've been grappling the last few days with what to say as a commentary to Judge Williams' speech, not knowing the content of his talk ahead of time. Fortunately, I did have an opportunity to meet with him yesterday and he told me that he was generally going to discuss whether the law can be used to protect the interests of native peoples, how well it can do that, and the idea of incremental changes in the law – changes that one can see and are somewhat predictable – versus paradigm shifts.

Last night, after listening to Professor Tsosie's keynote speech, I went home and thought about what I could add to the discussion. As I sometimes do, I turned to '*Ōlelo No'eau*,¹ a book of Hawaiian proverbs and poetical sayings, to see if there was something about the law or a related topic that might give me an idea on how to approach this commentary. After an hour or so of searching, I found nothing, so I closed the book. I had a restless sleep, waking up in the middle of the night to again think about what I might say. I woke up this morning and I decided to try '*Ōlelo No'eau* one more time. I opened it, pointed my finger, and ended up not with a proverb, but

* Assistant Professor Melody Kapilialoha MacKenzie gave this commentary to the keynote address by Chief Judge Joe Williams on "Colonization Stories from Across the Pacific" at the February 2005 APL&PJ Symposium on *Protecting Indigenous Identities: Struggles & Strategies Under International & Comparative Law*. Prof. MacKenzie is the Director of the Center for Excellence in Native Hawaiian Law at the William S. Richardson School of Law. She received her B.A. cum laude from Beloit College and her J.D. from the University of Hawai'i School of Law. She teaches Native Hawaiian Rights, Native Hawaiian Rights Clinic, and Selected Topics in Native Hawaiian Law.

¹ MARY KAWENA PUKUI, '*ŌLELO NO'EAU, HAWAIIAN PROVERBS & POETICAL SAYINGS* (1983).

with a wood block print of a He‘e, an octopus. I laughed and said to myself, “That’s exactly it, what better metaphor for the law then the He‘e, the octopus.”

What attributes of the He‘e are noted in Hawaiian proverbs?

The He‘e is slippery, crafty, and dishonest:

*He waha kou o ka he ‘e.*²
Yours is the mouth of an octopus.
You are a liar.

The He‘e is many faceted and complicated:

*Ka i‘a mana nui.*³
The fish of many divided parts.

The He‘e changes color and camouflages itself. It can melt into the background; it is malleable. And then of course, the He‘e is famous for its ink, with which it protects itself and obfuscates what should be clear and apparent.⁴

What has been our experience as Native Hawaiians with this He‘e? In this I echo Judge Williams’ assessment of the Māori experience – it has not been positive so far.

We need only to look to the Māhele of 1848, a process advocated by western business interests and legal advisors to Kamehameha III, which converted the Hawaiian communal land system into a private-property fee ownership system. In the Māhele process, only twenty-six percent of adult Hawaiian males received land. The common Hawaiian people received less than 30,000 acres,

² *Id.* at 104, # 969.

³ *Id.* at 149, # 1369.

⁴ Illustrating this point is another Hawaiian proverb:

Pupuhi ka he‘e o kai uli.
The octopus of the deep spews its ink.
The octopus escapes from its foes by spewing its ink and
darkening the waters.

Id. at 301, # 2751.

less than one percent of Hawai'i's four million acres of land.⁵ Subsequent laws after the Māhele allowed land ownership by non-natives,⁶ adopted the adverse possession doctrine,⁷ and permitted non-judicial foreclosure of mortgages,⁸ thereby leading to even greater loss of lands by chiefs and commoners alike.

This negative experience with the law continued and, indeed, Hawaiian suspicion of the law was validated in 1893 with the overthrow of the Hawaiian Kingdom by western businessmen assisted by U.S. diplomats and troops. Hawaiians, believing that the U.S. would honor international legal principles and its own laws sought to prevent annexation and submitted petitions to the U.S. Congress – over 21,000 signatures – protesting annexation.⁹ In a stunning move that went against all American constitutional precedent, when Congress annexed Hawai'i in 1898, it did so not through a treaty, which would have required approval by a two-thirds majority of the Senate, but rather by a joint resolution that required only a simple majority in each house.¹⁰ As acknowledged by Congress in 1993 through the Apology Resolution,¹¹ although Hawai'i was annexed to

⁵ Neil M. Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 856 (1975).

⁶ Act of July 10, 1850, *reprinted in* 2 Rev. Laws of Hawaii 1925, at 2233-34.

⁷ Act 22, Act of July 18, 1870, "An Act Limiting the Time Within Which Actions May be Brought to Recover Possession of Land."

⁸ Act 33, Act of July 18, 1874, "Act to Provide for the Sale of Mortgaged Property Without Suit and Decree of Sale." See ROBERT STAUFFER, *KAHANA: HOW THE LAND WAS LOST*, 92-107 (2004) for a discussion of the act.

⁹ Noenoe K. Silva, *Kanaka Maoli Resistance to Annexation in KŪ'E: THE HUI ALOHA 'ĀINA ANTI-ANNEXATION PETITIONS 1897-1898*, 1, 39 (Nālani Minton & Noenoe K. Silva eds., 1998).

¹⁰ The U.S. Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2. Hawai'i was annexed by a joint resolution of Congress. Joint Resolution of Annexation of July 7, 1898, 30 Stat. 750. See 12 Op. Off. Legal Counsel 238, 251-52 (1988) for a discussion of the annexation process.

¹¹ To Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii and to Offer an Apology to Native Hawaiians

the United States in 1898, the Hawaiian people never directly relinquished their claim to inherent sovereignty or over their national lands. This was the experience of Kānaka Maoli in our early days of contact with western law.

Hawaiians in modern times also have found little real justice through legal processes. Continuing disputes over monies due under State law for Native Hawaiian programs,¹² the dismal track-record of the Hawaiian Homes program established by a 1921 Congressional Act to provide Hawaiians with lands, and ongoing clashes between Hawaiians and private landowners seeking to prohibit access to traditional cultural sites and gathering rights have only reinforced the view that the law cannot be trusted. It is a He‘e – slippery, shift, and devious.

And perhaps one small indication – something from my personal experience – that this He‘e has been slippery, that it obfuscates, that you cannot trust it, is that in 1991, when the State established a process for beneficiaries of the Hawaiian Homelands trust to file damages claims,¹³ only about a quarter of those who could file claims did so. In an ironic twist not lost on the Native Hawaiian community, the State subsequently dismantled the claims process without paying any damages when it became clear that millions of dollars would be necessary to address even the few claims that had been filed.¹⁴ So this has been our relationship with the He‘e - one of distrust, of betrayal, of slipperiness, of laws that change just when it appears that Hawaiians will benefit. Kānaka Maoli and Māori, unfortunately, share this common history.

But, I don't want to malign the He‘e too much because Hawaiians also recognize the many positive attributes of the He‘e. The liver of the He‘e is mashed by fishermen and used as bait for other fish. When fish are not biting, the fishermen take the heart of

on behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

¹² See, e.g., *Trustees of OHA v. Yamasaki*, 69 Haw. 154, 737 P.2d 446 (1987); *OHA v. State*, 96 Hawai‘i 388, 31 P.3d 901 (2001).

¹³ Act 323, 1991 Haw. Sess. Laws, codified as HAW. REV. STAT. ch. 674.

¹⁴ See generally, HAWAIIAN HOME LANDS TRUST INDIVIDUAL CLAIMS REVIEW PANEL, FINAL REPORT TO THE GOVERNOR AND THE 2000 HAWAII LEGISLATURE.

the He'e and mash it up and mix it with poi - and it is very 'ono.¹⁵ And we all know that the 'ono meat of the He'e mixed with lū'au makes one of those tasty delicacies we like to eat. So the He'e has that slippery aspect, that part we can't get our hands around, that part we cannot hold. But it also has redeeming qualities that nourish us and that we value.

In his talk, Judge Williams discussed the incremental nature of change in the law. And, I think, this morning, when Davianna McGregor and the panel members discussed the evolution of the law in relation to traditional and customary rights of Hawaiians,¹⁶ you could see incremental changes over the course of almost thirty years. From 1978, with the passage of the constitutional amendment recognizing the traditional and customary rights of Native Hawaiians, to 1982, when the *Kalipi*¹⁷ decision came out validating those rights, although interpreting them more narrowly than we had hoped.

The next case – the 1992 *Pele Defense Fund*¹⁸ case – extended those rights beyond the ahupua'a¹⁹ if it could be shown that traditionally the right had been exercised beyond the ahupua'a boundary. Subsequent cases, most notably the PASH²⁰ decision, advanced and refined the law to the point where the latest cases have held that government agencies, in granting permits for development, must take into consideration the impact on Native Hawaiian traditional and customary rights. The cases make clear that the agency must make an independent assessment and identify the

¹⁵ “Delicious, tasty, savory[.]” MARY KAWENA PUKUI & SAMUEL ELBERT, HAWAIIAN DICTIONARY 289 (rev. ed. 1986).

¹⁶ The panel, moderated by Professor Davianna McGregor of the University of Hawai'i Department of Ethnic Studies, focused on environmental versus development interests and the effects on Hawai'i's indigenous peoples.

¹⁷ *Kalipi v. Hawaiian Trust Co., Ltd.*, 66 Haw. 1, 656 P.2d 745 (1982).

¹⁸ *Pele Defense Fund v. Paty*, 79 Hawai'i 578, 836 P.2d 1247 (1992).

¹⁹ “Land division usually extending from uplands to the sea[.]” PUKUI & ELBERT, *supra* note 15, at 9.

²⁰ *Pub. Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 903 P.2d 1246 (1995).

feasible action, if any, to be taken to reasonably protect Native Hawaiian rights.²¹

So illustrating Judge William's point, over the course of this thirty-year period there has been an incremental change in the law, in this instance largely for the good. But during that time of change, there were many instances when the Native Hawaiian community had to rally in order to make sure that those rights were continued and preserved. There were efforts in the State legislature to restrict traditional and customary rights, to define them, and possibly to define them out of existence.²²

Judge Williams also discussed the concept of a paradigm shift – an unexpected and unplanned for shift in the law that doesn't arrive out of doctrinal discourse but out of social movements external to the law. Hawaiians also have experienced a paradigm shift in the law, but it has been a negative one – one with which we are still dealing. That shift is reflected in the United States Supreme Court's decision in *Rice v. Cayetano*.²³

At the time that the Office of Hawaiian Affairs (OHA) was created by the 1978 Constitutional Convention, it was an accepted doctrine that the people of the State had the authority to create such an entity. The U.S. Supreme Court had issued the *Morton v. Mancari*²⁴ decision a mere four years earlier. It seemed that the interests of native people were finally being recognized and that the State of Hawai'i, in its efforts to address past wrongs, could use the *Mancari* precedent in establishing OHA. Those of us who witnessed the creation of OHA viewed it as a first step. It was to be the first step that would lead, we thought, to federal recognition.

²¹ *Ka Pa'akai O Ka 'Āina v. Land Use Comm'n*, 94 Hawai'i 31, 39, 7 P.3d 1068, 1076 (2000).

²² See D. Kapua Sproat, Comment: *The Backlash Against PASH: Legislative Attempts To Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321, for a discussion on attempts to limit traditional and customary rights.

²³ *Rice v. Cayetano*, 528 U.S. 495 (2000), held that state laws restricting the electorate for Office of Hawaiian Affairs' trustees to citizens of Hawaiian ancestry violated the Fifteenth Amendment to the U.S. Constitution.

²⁴ *Morton v. Mancari*, 417 U.S. 535 (1974), upheld the Bureau of Indian Affairs' Indian hiring preference to a Fifth Amendment racial discrimination challenge by applying rational basis review and finding that the preference was reasonable and rationally designed to further Indian self-government.

Let me give just a bit of context to the whole idea of federal recognition. Remember that OHA was created in a time where self-determination for Native Americans was a relatively new federal policy. The idea of a government-to-government relationship with the U.S., a new type of relationship, was intriguing. More than intriguing, it was compelling. The old phrase “domestic dependent nations,” describing the relationship between native tribes and the federal government, appeared to be changing. The “domestic, dependent” aspect of the relationship was giving way to the “nation” aspect of the phrase. At least that was what we here in Hawai‘i perceived was happening on the U.S. continent with the tribes. We believed that we too were moving toward nationhood. That was the vision. We thought we had time, time to educate, time to organize, time to build consensus.

But it didn’t happen. For various reasons, OHA’s initial promise was not fulfilled. One primary reason, of course, was that OHA necessarily spent its first ten to fifteen years of existence trying to wrest from the State its share of ceded lands revenues.²⁵ So, the promise, the idea that we would be moving towards federal recognition, towards a governmental relationship with the United States, was compelling at the time but, ultimately, it failed. Indeed, there was little agreement amongst Hawaiians that federal recognition was necessary or desirable.

This was our situation at the time the *Rice* case was decided. And where once federal recognition seemed like a choice – something we could consider and move toward if we chose to, it now appears to be a necessity if we are to survive. With the *Rice* decision there is a new sense of urgency. But this sense of urgency is tinged with apprehension and fear – fear that if we do not receive federal recognition, the programs and laws that benefit Kānaka Maoli will no longer exist.

Last night, in discussing federal recognition with Professor Tsosie, she commented that she had not met anyone in Hawai‘i that actually viewed the federal recognition bill, the Akaka Bill,²⁶ as a

²⁵ See, e.g., *Trustees of OHA v. Yamasaki*, 69 Haw. 154, 737 P.2d 446 (1987).

²⁶ The Native Hawaiian Government Reorganization Act of 2005, S. 147 and H.R. 309, currently pending in Congress, is commonly known as the Akaka Bill, after Sen. Daniel K. Akaka its chief sponsor in the Senate.

positive choice; instead it seemed people felt backed into a corner. And she cautioned that we consider that very closely - you do not want to act when you feel backed into a corner.

Ironically, from Professor Tsosie's keynote address last night, it seems that even if Hawaiians were to achieve federal recognition through the Akaka Bill or some other mechanism, the decisions of the U.S. Supreme Court indicate that the sovereignty of Indian nations – limited as it is – may not survive the next twenty years. Thus we may now be moving towards a status that ultimately will prove toothless and ineffectual.

With this uncertain time ahead of us, and a justifiable history of distrusting the law, what do we do with this He'e? There is another 'ōlelo no'ēau about the He'e that gives us guidance:

*Ka i'a pipili i ka lima.*²⁷

The fish that sticks to the hand.

The He'e will not go away, it is stuck to our hands and we must handle it – with its slippery nature and its many arms, with its ability to camouflage and obfuscate – and literally leave us spattered in ink. We must handle it carefully, but as indigenous peoples, we must handle it.

I conclude my remarks with an excerpt from Professor Jonathon Osorio's article in the Hawaiian Journal of Law and Politics entitled "*Ku'e and Ku'oko'a (Resistance and Independence): History, Law, and Other Faiths.*"²⁸ In that article, Professor Osorio compares two initiatives advocating different approaches to sovereignty – the Council of Regency of the Kingdom of Hawai'i and Ka Lāhui Hawai'i. Although the approach of each organization is very different, he concludes that some common ground may exist after all. It is a rather long excerpt, but I thought it was very insightful and relevant to this discussion of how indigenous peoples interact with the law:

²⁷ PUKUI, *supra* note 1, at 150, # 1379.

²⁸ Jonathon Kamakawiwo'ole Osorio, *Ku'e and Ku'oko'a (Resistance and Independence): History, Law, and Other Faiths*, 1 HAWAIIAN JOURNAL OF LAW AND POLITICS 92, at [http://www2.hawaii.edu/~hslp/journal/vol1/Osorio_Article_\(HJLP\).pdf](http://www2.hawaii.edu/~hslp/journal/vol1/Osorio_Article_(HJLP).pdf).

Certainly all the major sovereignty initiatives have proclaimed a faith in law and the electoral process. This, in itself, is a telling reminder that our world has changed, and significantly. One crucial aspect of law is that it enables contending and competing groups within a society to coexist, compensating for the lack of faith between them by requiring that they place their faith in law instead. Even if law may betray the weak and helpless more often than it does the powerful, it may be the only platform from which one group, no matter how small, may fearlessly stake out its right to exist and to endure.

However, placing faith in law requires that we acknowledge a layer of authority other than custom and tradition. This is an ideological razor's edge for nationalists who see sovereignty as a protector of "the Hawaiian culture." Law involves compromise - and tradition can be so uncompromising. Nevertheless, Hawaiians have already made the concession to trust in law. Perhaps that should be the first thing on which we can agree. We will certainly dispute many other things: our read of history, the importance we attach to ancestry, how we will live, and how we will treat Americans and foreigners. Because we do not see these things the same way now, let us fashion laws that will enable us to act together in spite of it all.

Among all the conversions the Kanaka Maoli accepted from America, the one that proved most unreliable was the implicit promise accompanying the introduction of western laws - that justice is possible. More than 160 years later, our willingness to drape our future onto a legal frame demonstrates profound understandings of law and history. Regardless of the fact that law has changed the Native and may have created a being that is not entirely like our ancestors, law has also been made a part of our being, adopted and adapted to our view of ourselves and the world. Our experience with colonialism makes us wise in our understanding of the limits and promise of law. We do understand the

significance of bending to its authority. In a world where other faiths are so carelessly deployed against one another, humanity itself should prefer that a genuine faith in history and law be desirable, useful, and meaningful to all. That the imperialist can convey this message as credibly as the conquered is doubtful.²⁹

So what do we do with the law, with this He‘e? As Professor Osorio sees it, Hawaiians have already made the decision to place our faith in the law. Having done so, we must also learn to handle the He‘e, to understand it, to embrace it, to change it – we must do all of those things necessary to make it our own.

²⁹ *Id.* at 112-13.

Raising the Bar: The Commonwealth of the Northern Mariana Islands, the Public Land Trust, and a Heightened Standard of Fiduciary Duty

Blaine Rogers ¹

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“In the middle of the ocean
Is where my land is
That is where I
Will find what I’m searching for.

And one day I shall leave
But I shall return.
For I cannot depart from you,
These Mariana Islands.”²

¹ Class of 2006, William S. Richardson School of Law, University of Hawaii at Manoa. Special thanks to Professor Denise Antolini, Professor Jon Van Dyke, Professor Randall Roth, and Judge Kenneth Govendo for their assistance with this article. Many thanks to the editors and staff of the ASIAN-PACIFIC LAW & POLICY JOURNAL for their assistance during the editing process.

“Are you of Northern Marianas descent? If so, the land and resources of Pagan belong to you as an indigenous person as guaranteed by the Covenant Agreement that formed the Commonwealth of the Northern Mariana Islands. You can and should join PaganWatch in demanding that your right to participate in the decisions over your island and your resources are protected. Are you a CNMI citizen? If so, you can and should object to the squandering of an opportunity that can improve the lives of everyone in the CNMI. Are you a Chamorro from Guam? If so then Pagan is part of your cultural and historic ancestral lands and you should fight to keep Pagan from being destroyed through careless management and exploitation.”³

“The new government of the CNMI has good intentions for its people. It simply does not know how to fulfill those intentions.”⁴

I. INTRODUCTION

Rarely does heated controversy engulf an uninhabited island. But that is what has happened to Pagan, the fifth largest island in the Northern Mariana Islands chain, located approximately 3,800 miles west of Honolulu, Hawaii in the Pacific Ocean. A volcanic eruption in 1981, which drove Pagan’s small resident population from the island, deposited an estimated 200 million tons of volcanic pozzolan ash on the island’s surface.⁵ This pozzolan deposit, highly valued as a

² The Commonwealth of the Northern Mariana Islands (CNMI) National Anthem, *reprinted in* ARNOLD LEIBOWITZ, *DEFINING STATUS, A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 519 (1989).

³ Chamorro.com, *Disaster Threatens Pristine Pagan Island in the Northern Marianas*, at <http://www.chamorro.com/community/pagan/pagan.html>.

⁴ Letter from Kenneth Moore, Chairman of Azmar International Inc., *An Open Letter*, at http://www.chamorro.com/community/pagan/20jan03_azmar_open_letter.html.

⁵ Chamorro.com, *Disaster Threatens Pristine Pagan Island in the Northern Marianas*, at <http://www.chamorro.com/community/pagan/pagan.html>. See generally Western Pozzolan: Overview, at <http://www.westernpozzolancorp.com/overview.htm>. The term “pozzolan” derives from the ancient term “Pozzolana,” referring to the volcanic ash found on the slopes of Mt. Vesuvius, adjacent to the town of Pozzouli near the Bay of Naples. The

cement additive, has become the center of a heated controversy involving three main parties: the Marianas Public Land Authority (“MPLA”), the autonomous corporation with a constitutional obligation to manage the public lands of the Commonwealth of the Northern Mariana Islands for the benefit of people of Northern Marianas descent (“NMDs”); Azmar International Inc., an Arizona-based company with designs on extracting the pozzolan; and PaganWatch, a citizens’ group opposing Azmar’s proposal and favoring locally managed, environmentally conscious extraction of the pozzolan. The stakes are high. One estimate puts the value of Pagan’s pozzolan at fourteen billion dollars.⁶ Although Pagan itself remains a portrait of serenity, the players, as the PaganWatch web site quoted above indicates, have staked out intensely partisan positions in the battle for control of this resource. The controversy has exposed MPLA to heightened scrutiny as to whether it is meeting its constitutionally mandated fiduciary duty to manage the Commonwealth of the Northern Mariana Islands’ (“CNMI”) public lands for the “benefit of the people of the Commonwealth who are of Northern Marianas descent.”⁷

The current battle for Pagan’s pozzolan ash began in 2002 when Azmar first applied to MPLA for a permit.⁸ Facing pressure from proponents of the plan, including local legislators and the governor, and vociferous opposition from PaganWatch and individual citizens, the MPLA decision on whether to grant the permit soon

Romans discovered that pozzolan, when mixed with lime and water, produced cement with hydraulic properties. Examples of structures built with durable pozzolanic cement include the Roman Coliseum and Aqueducts, as well as the piers of the Bay Bridge in San Francisco. See also AzmarInternational.com, *Pagan Island Natural Pozzolanic Ash*, at <http://www.azmarinternational.com/product.htm> (stating that pozzolan cement is stronger and offers reduced costs and emissions compared to regular cement. A study conducted on Pagan’s pozzolan deposit indicates that it is of very high purity).

⁶ Chamorro.com, *Disaster Threatens Pristine Pagan Island in the Northern Marianas*, at <http://www.chamorro.com/community/pagan/pagan.html>.

⁷ COMMONWEALTH CONST. art. XI, § 4 (CNMI).

⁸ Liberty Dones, *MPLA Allows Investor to Study Mt. Pagan Ashes*, SAIPAN TRIBUNE, Jan. 22, 2003, at <http://www.saipantribune.com/archives>; see also Chamorro.com, at <http://www.chamorro.com/community/pagan/pagan.html>.

became front page news in the local newspapers.⁹ In late 2003, MPLA approved a limited-use permit for Azmar to conduct research on the value of Pagan's pozzolan.¹⁰ In response, PaganWatch mounted a fierce campaign against the proposed permit, besieging the newspapers with letters to the editor and launching its own website.¹¹ In the meantime, MPLA board members, along with three CNMI legislators, held a private meeting with Azmar officials in April 2004.¹² Allegations of financial insecurity and lack of mining experience continued to receive coverage in the local press, with opponents citing these and other reasons for MPLA to deny the permit and Azmar's local spokesperson rebutting the accusations.¹³ In August 2004, despite the recommendations of its staff to suspend negotiations and put out a request for proposals, the MPLA board granted approval to Azmar for a two-year conditional permit.¹⁴ This permit required the company to submit detailed financial records before final approval would be granted.¹⁵ Despite Azmar's failure to

⁹ The CNMI has two local newspapers, the SAIPAN TRIBUNE and MARIANAS VARIETY.

¹⁰ *Mining Investor Seeks MPLA Action*, SAIPAN TRIBUNE, Apr. 12, 2004, at <http://www.saipantribune.com/archives>.

¹¹ See Chamorro.com, *Disaster Threatens Pristine Pagan Island in the Northern Marianas*, at <http://www.chamorro.com/community/pagan/pagan.html#1>, for a sampling of various letters and e-mails submitted to local newspapers.

¹² Gemma Q. Cassas, *Arizona Company Renews Bid for Pagan Ash*, MARIANAS VARIETY, Apr. 9, 2004, at <http://166.122.164.43/archive/2004/April/04-09-12.htm>.

¹³ See generally the following articles from the PaganWatch website, at <http://www.chamorro.com/community/pagan/pagan.html>. *Pagan Community Says No to Mining Permit*, MARIANAS VARIETY, Apr. 16, 2004; *Azmar Says It Can Provide Capital for Pagan Project*, MARIANAS VARIETY, May 12, 2004; *In Defense of Azmar*, SAIPAN TRIBUNE, May 26, 2004; *CAER Withdraws Proposal to Mine Pagan*, SAIPAN TRIBUNE, May 27, 2004; *More Distortions from Azmar*, SAIPAN TRIBUNE, June 3, 2004; *Suspend any Pozzolan Extraction without Study*, SAIPAN TRIBUNE, June 9, 2004; etc.

¹⁴ Agnes Donato, *Azmar Gets Conditional OK*, SAIPAN TRIBUNE, Aug. 18, 2004, at <http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=39685>.

¹⁵ *Id.* MPLA ordered Azmar to submit: its most recent articles of incorporation; the names of its incorporators, officers and shareholders, and how much shares each of them holds; an audited financial statement; personal financial

submit the necessary information, the MPLA Board in November 2004 agreed to a fifteen day, confidential negotiation period with the company.¹⁶ Finally, in December 2004, the Board members unanimously voted to reject Azmar's permit proposal, despite individually stating "how much they wanted Azmar's mining project to materialize," because of the company's continued failure or refusal to provide the necessary financial documents.¹⁷ Despite this rejection, Azmar insisted that negotiations were continuing and that the most recent decision was the result of a "miscommunication."¹⁸ Following the passage on June 8, 2004, of CNMI Public Law 14-204, which mandated the cessation of all negotiations pursuant to mining on Pagan, MPLA established a task force to perform an in-depth study on the pozzolan.¹⁹ Amidst this controversy, the only point on which press coverage of the event seems to indicate any agreement among the warring parties was unilateral dissatisfaction with MPLA.

The CNMI, like many other small island nations, possesses a limited supply of land and natural resources. Total land area is 176.5 square miles, about four times the size of San Francisco.²⁰

statements of the shareholders; initial capital for Pagan mining; names of investors; names of prospective buyers; and a letter of credit from a bank covered by the Federal Deposit Insurance Corp. *Id.*

¹⁶ Gemma Q. Cassas & Ulysses Torres Sabuco, *MPLA Agrees to Negotiate with Azmar*, MARIANAS VARIETY, Nov. 17, 2004, at http://www.chamorro.com/community/news_archive/mv_17nov04.html.

¹⁷ Agnes Donato, *Azmar Permit Junked*, SAIPAN TRIBUNE, Dec. 4, 2004, at <http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=42474>.

¹⁸ Agnes Donato, *As Azmar Vows to Pursue Application*, SAIPAN TRIBUNE, Dec. 6, 2004, at <http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=42511>. Azmar President Kenneth Moore insisted that all of the necessary documents had been submitted and date-stamped prior to the deadline. He claimed that the documents would be re-submitted to MPLA "as a reminder". *Id.*

¹⁹ Pozzolan Extraction Act, Pub. L. No. 14-204, § 2 (2004); *see also* Agnes Donato, *Team to Study Pagan's Pozzolan Formed*, SAIPAN TRIBUNE, Dec. 6, 2004, at <http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=42510>. MPLA board member Nicolas Nekai was appointed to chair the task force, which was composed of MPLA officials, as well as representatives from the Legislature, Northern Islands Mayor's Office, and other groups. *Id.*

²⁰ *See* CNMI-Guide.com, *Islands Information*, at <http://www.cnmi-guide.com/info/essays/index.html>.

Recognizing this, the CNMI government, in negotiating the Covenant with the United States during the 1970s and in formulating its Constitution in 1976, took specific steps to safeguard this resource. First, the Constitution restricted the sale of private land in the CNMI to NMDs.²¹ Second, it gave exclusive ownership of all public lands to NMDs and entrusted management of the lands to two entities – the Marianas Public Land Corporation (“MPLC”) and the Marianas Public Land Trust (“MPLT”).²² MPLC was tasked with public land management, instituting a homestead program, and leasing remaining public lands for commercial purposes.”²³ MPLT was to manage the financial side of the trust, with its five trustees prudentially investing the revenues generated from MPLC’s commercial leases of public lands.²⁴ The board members of both MPLC and MPLT were to be held to strict standards of fiduciary care in carrying out their respective duties.²⁵

Throughout the nearly thirty years of the CNMI’s existence, the entity in charge of the land management aspect of this trust has taken on numerous formulations – from MPLC, to a division within the Department of Land and Natural Resources, to the Board of Public Lands, and now back to an “autonomous” corporation known as the Marianas Public Land Authority.²⁶ Despite these changes in structure, as the controversy over the allocation of Pagan’s public land indicates, there remain many unresolved issues in MPLA’s management of the public lands of the CNMI. Is the agency fulfilling its constitutional mandate as a fiduciary to direct the affairs of the corporation for the “benefit” of NMDs? What is meant by “strict standards of fiduciary care” and what duties does this entail? Should it involve only economic considerations or should other factors apply? Do traditional trust law principles apply to the CNMI’s public land

²¹ COMMONWEALTH CONST. art. XII, § 1 (CNMI).

²² *Id.* art. XI, §§ 4, 6.

²³ *Id.* art. XI, § 5.

²⁴ *Id.* art. XI, § 6.

²⁵ *Id.* art. XI, §§ 4, 6.

²⁶ See *infra* Section III, for an overview of the history of the public land management entity.

trust and are there any analogous trusts to provide guidance? Can lessons learned by a comparable Hawaiian state agency, the Department of Hawaiian Homelands, offer assistance in determining the scope of MPLA's duty? Do judicial decisions by the Hawai'i and CNMI supreme courts provide insight? Finally, what steps can MPLA take to better carry out its fiduciary mission?

This paper will demonstrate that the scope of fiduciary duty implicit in the management of the CNMI public lands is far stricter than the CNMI Supreme Court and the various agencies responsible for administering it have interpreted it to be. It will address this issue in five parts. Part II provides a historical and political overview of the CNMI. Part III examines the management of public lands as set forth in the CNMI Constitution and subsequent legislation. Part IV is divided into sub-parts: the first examines the reasons behind the numerous changes in public land management, with special focus on the mission and structure of the current MPLA; the second analyzes the CNMI "hybrid" public land trust in light of traditional private, charitable and public trust principles; the third examines the CNMI Supreme Court's analysis of fiduciary duty in two key cases – *Govendo v. MPLC* and *Torres v. MPLC*; the fourth scrutinizes comparable trusts for guidance; and the fifth analyzes the fiduciary duty of the Department of Hawaiian Homelands and analogizes it into a higher standard of fiduciary duty for MPLA. Finally, Part V offers some conclusions for implementing this higher standard for the benefit of MPLA's NMD beneficiaries.

II. HISTORICAL BACKGROUND

A. THE NORTHERN MARIANA ISLANDS – A HISTORY OF COLONIAL OCCUPATION

The Northern Mariana Islands²⁷ is a chain of fourteen islands located approximately 1200 miles north of the equator in Micronesia, a geographical region within Oceania.²⁸ Comprised of over ten

²⁷ The terms Northern Mariana Islands, Northern Marianas, Islands and CNMI will be used interchangeably throughout the remainder of the paper.

²⁸ Lydia Camacho-Romisher, *The Regulatory Life Cycle and Regulatory Concerns for the Utilities of the Northern Mariana Islands*, 40 NAT. RESOURCES J. 569, 570 (2000) (citing DOUGLAS L. OLIVER, *THE PACIFIC ISLANDS* 3, 76 [2d ed.

thousand islands spread throughout the western Pacific Ocean, Oceania is divided into three principal geographical divisions: Polynesia, Melanesia, and Micronesia.²⁹ Micronesia comprises the northern section of Oceania and consists of over two thousand islands, including the Mariana Islands.³⁰ The Marianas consist of Guam and the Northern Marianas, distinct political entities with unique affiliations with the United States.³¹ The Northern Marianas extend four hundred miles north from Guam and include Rota, Aguijuan, Tinian, Saipan, Farallon de Medinilla, Anatahan, Sariguan, Guguan, Alamagan, Pagan, Agrihan, Asuncion, Maug, and Farallon de Pajaros.³² The islands enjoy a tropical marine climate, with high temperatures and humidity.³³

The inhabitants of the Northern Marianas experienced foreign colonization and occupation for over 400 years.³⁴ “Discovered” by Magellan in 1521 and colonized by Spain for the next 300 years, the Islands became an important way station for Spanish ships as well as an outpost for the spread of Christianity.³⁵ Acts of genocide by the Spanish in the late 17th century nearly eliminated the indigenous

1961)]; *see also* ARNOLD LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 520-593 (1989).

²⁹ *See* LEIBOWITZ, *supra* note 28, at 571. Polynesia consists of Hawai'i, Western and American Samoa, Tonga, Niue and French Polynesia. Melanesia consists of Papua New Guinea, the Solomons, Vanuatu, Fiji and New Caledonia. Micronesia consists of Guam, Federated States of Micronesia, Palau, the Caroline Islands, the Marshall Islands, and the Northern Mariana Islands. *Id.*

³⁰ *Id.* at 571.

³¹ *Id.*

³² *Id.*

³³ William H. Stewart, *The CNMI Guide: Islands Information*, at <http://www.cnmi-guide.com/info/>.

³⁴ Marie Rios-Martinez, Note, *Congressional Colonialism in the Pacific: The Case of the Northern Mariana Islands and its Covenant with the United States*, 3 SCHOLAR 41, 42 (2000).

³⁵ *Id.* at 46; *see also* Howard P. Willens & Deanne C. Siemer, AN HONORABLE ACCORD: THE COVENANT BETWEEN THE NORTHERN MARIANA ISLANDS AND THE UNITED STATES 5 (2002).

Chamorro population.³⁶ In 1815, a wave of immigrants from the Caroline Islands, fleeing their typhoon-ravaged islands, settled in Saipan.³⁷ This accounts for the CNMI's dual indigenous population of Chamorros and Carolinians.

Spain sold the Northern Mariana and Caroline Islands to Germany in 1899 for \$4.5 million.³⁸ Germany briefly colonized the islands, instituting agriculture, fishing, and coconut production to sustain the Islands' economy.³⁹ The Germans' tenure was short lived as the Japanese navy seized the islands in 1914 after declaring war on Germany.⁴⁰ Under Japan's occupation, which lasted until 1945, the indigenous population was forced to labor in the sugarcane fields and to speak Japanese.⁴¹ By 1936, the fishing and sugarcane industries were flourishing, and the Islands had become a key strategic military base for the Japanese military.⁴²

By the time of World War II, almost thirty thousand Japanese troops were garrisoned on Saipan and Tinian.⁴³ American forces invaded Saipan on June 15, 1944, beginning one of the fiercest and deadliest battles of the war.⁴⁴ Approximately 66,000 Japanese troops and civilians, 400 indigenous citizens, and 5,000 Americans perished

³⁶ Rios-Martinez, *supra* note 34, at 46 (citing Donald F. McHenry, MICRONESIA: TRUST BETRAYED 5 (1975)); see also William H. Stewart, *The CNMI Guide: Islands Information*, at <http://www.cnmi-guide.com/info/>.

³⁷ Stewart, *supra* note 36.

³⁸ See Camacho-Romisher, *supra* note 28, at 573 (citing Harold F. Nufer, MICRONESIA UNDER AMERICAN RULE: AN EVALUATION OF THE STRATEGIC TRUSTEESHIP (1947-77) 3-10, 26-30 (1978)).

³⁹ Rios-Martinez, *supra* note 34, at 46.

⁴⁰ See Camacho-Romisher, *supra* note 28, at 574 (citing Nufer, *supra* note 37 at 10).

⁴¹ Rios-Martinez, *supra* note 34, at 46 (citing to a Telephone Interview with Rosa Lizama Taisacan, Resident of the Northern Mariana Islands (Oct. 1, 1999)).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

during the battle for the Marianas.⁴⁵ The Islands were officially secured in July of 1944, a key strategic victory for the Americans. On August 6, 1945, an American B-29 bomber named the Enola Gay flew from the Tinian airstrip to drop the atomic bomb on Hiroshima.⁴⁶ On August 15, 1945, the Japanese Emperor surrendered to Allied forces, leaving the Islands in control of American forces.⁴⁷

B. PRE-COVENANT STATUS: THE NORTHERN MARIANA ISLANDS AS PART OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS

The Allied countries established the United Nations (“U.N.”) shortly before the end of World War II.⁴⁸ One of the U.N.’s stated goals was to restore the right of self-determination to colonies and territories occupied during the war.⁴⁹ The U.N. created an International Trusteeship System, which placed the colonized nations “under the administration of independent countries that were obligated to help the colonies transition to self-government.”⁵⁰ The U.N. designated all of Micronesia the Trust Territory of the Pacific Islands (“TTPI”) and placed it under the administration of the United States.⁵¹ For nearly two decades, the U.S. exerted absolute authority over the islands, restricting entry and establishing a strong military

⁴⁵ Sally Apgar, *Enola Gay pilot visits Pearl Harbor*, HONOLULU STAR-BULLETIN, June 11, 2004, at <http://starbulletin.com/2004/06/11/news/story2.html>.

⁴⁶ David Moore, *The Battle of Saipan – The Final Curtain*, at <http://www.battleofsaipan.com/seabee.htm>.

⁴⁷ *Id.*

⁴⁸ Rose Cruz Cuison, *The Construction of Labor Abuse in the Mariana Islands as Anti-American*, 6 ASIAN PAC. AM. L.J. 61, 68 (2000).

⁴⁹ *Id.*

⁵⁰ *Id.* (citation omitted).

⁵¹ *Id.* The TTPI imposed specific duties on the United States, including encouraging the residents to establish political institutions, to participate in government, and to strive towards self-government or independence. *Id.* See also Leibowitz, *supra* note 24, at 488 (describing the United States’ role as administrator of the TTPI).

foothold in the region.⁵² Little was done to foster economic growth and the islands of the TTPI languished economically.⁵³

In the 1960s, perhaps due to dissatisfaction with the U.S.'s administration of the TTPI, Micronesians began to discuss with the United States the prospects for self-governance.⁵⁴ This led to the formation of the Congress of Micronesia, which petitioned the United States to help promote self-determination in Micronesia.⁵⁵ In July of 1969, the Congress of Micronesia created the ten-person Political Status Delegation to represent Micronesia in discussions with the United States.⁵⁶ The U.S.-Micronesia negotiations began in October of 1969 but substantial disagreements over land issues inhibited progress.⁵⁷ The Micronesians stressed the "special significance of land in their small islands and insisted that they have unqualified control over landownership and use."⁵⁸ They demanded the opportunity to renegotiate all existing land relationships within the TTPI.⁵⁹ In addition, differences emerged regarding the degree of self-governance, with the U.S. resisting various restrictions on its authority urged by the Micronesians.⁶⁰ In October of 1969, the first round of negotiations ended in an impasse.⁶¹

During the second round of negotiations in 1970, the Micronesian Political Status Delegation announced four non-negotiable principles with respect to a future relationship with the

⁵² Camacho-Romisher, *supra* note 28, at 574 (2000).

⁵³ *Id.*

⁵⁴ Cuison, *supra* note 48, at 69 (citing Don A. Farrell, HISTORY OF THE NORTHERN MARIANA ISLANDS 558-72 (Phillis Koontz ed., Public School System Commonwealth of the Northern Mariana Islands, 1991)).

⁵⁵ Rios-Martinez, *supra* note 34, at 49.

⁵⁶ Willens & Siemer, *supra* note 35, at 18.

⁵⁷ *Id.*

⁵⁸ *Id.* at 19.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

United States: first, that Micronesian sovereignty resided in the people of Micronesia and its government; second, that Micronesian people possessed the right to self-government and had the right to choose independence or free association with any nation; third, that the Micronesian people had the right to adopt their own constitutions; fourth, that free association should be in the form of a compact, unilaterally terminable by either party.⁶² Contrary to this declaration, the representatives of the Northern Marianas indicated a desire to enter into a close political relationship with the United States.⁶³ Although initially opposed to fragmentation of the Trust Territory, the U.S. agreed to separate negotiations with the Northern Marianas delegation in 1972.⁶⁴ In February 1975, after long and arduous negotiations, the parties reached agreement on the Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("Covenant").⁶⁵

C. THE COVENANT

On June 17, 1975, the people of the Northern Mariana Islands approved the Covenant by a plebiscite vote of 78.8%.⁶⁶ It passed both houses of the U.S. Congress by a joint resolution.⁶⁷ On March 24,

⁶² *Id.* at 20.

⁶³ Cuison, *supra* note 48 at 69 (citing Farrell, *supra* note 53, at 61).

⁶⁴ Rios-Martinez, *supra* note 34 at 49.

⁶⁵ Cuison, *supra* note 48, at 70. It should be noted that, when discussing the Covenant, the CNMI Constitution and past legislation, verb tense usage may vary depending on the status of the document. As much as possible, the author has tried to remain consistent in tense usage while also conveying whether the law is current or repealed.

⁶⁶ *Id.* (citing Report of the United Nations Visiting Mission to Observe the Plebiscite in the Mariana Islands District, Trust Territory of the Pacific Islands, June 1975, U.N. TCOR, 43 Sess., Supp. No. 2, at 34, U.N. Doc. T/1770 (1976) (reporting that 78.8 percent of the registered indigenous people voted to approve the Covenant); Ninety-five percent of the people of the Northern Mariana Islands eligible to vote and ninety-five percent of these voted. *See* S. REP. NO. 94-596, at 5 (1976)).

⁶⁷ *See* Joint Resolution, Pub. L. No. 94-241, 90 Stat. 263 (codified in 48 U.S.C. § 1681 (2006)) [hereinafter Covenant].

1976, President Gerald Ford enacted the Covenant into law by signing the joint resolution.⁶⁸ While several of the provisions went into effect immediately, the entire agreement did not go into full effect until November 3, 1986, making the residents of the Northern Mariana Islands United States citizens and the newest members of the American family.⁶⁹ For the first time in four centuries, the people of the Northern Marianas had exercised their right of self-determination by negotiating and approving a political arrangement with the United States.⁷⁰

The Covenant created a self-governing Commonwealth of the Northern Mariana Islands (“CNMI”) in permanent political union with the United States.⁷¹ Although patterned after the agreements between the U.S. and Puerto Rico, as well as the relationship between the U.S. and Guam, the Covenant contained unique provisions not present in either of the other two agreements.⁷² The agreement establishes the scope of the political relationship with the U.S. and provides guidelines to assist the CNMI in achieving self-governance.⁷³ The political structure of the CNMI is modeled after

⁶⁸ *Id.*

⁶⁹ See Proclamation No. 5564, 51 Fed. Reg. 40,399 (November 7, 1986), reprinted in 48 U.S.C. § 1801 (2006).

⁷⁰ Cuisson, *supra* note 48, at 71.

⁷¹ See generally Covenant, *supra* note 67.

⁷² Camacho-Romisher, *supra* note 28, at 575 (citing MARIANAS POL. STATUS COMM’N, SECTION BY SECTION ANALYSIS OF THE COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 2 (1975)).

⁷³ *Id.* Key elements of the Covenant provide for:

- The commitment of the U.S. to assist the government of the CNMI to achieve a higher standard of living for its people and to develop the economic resources needed to meet the financial obligations of local self-government;
- The formulation and amendment of a constitution of, for, and by the people of the Northern Mariana Islands;
- Establishment of a republican form of government with legislative, executive, and judicial branches;
- Guidelines for citizenship and nationality;
- Judicial authority and jurisdiction;

the political structure of the United States -- a system of checks and balances ensuring the citizens of the various islands a form of equal representation.⁷⁴ There is a central government on Saipan with an elected Governor, an executive appointed administration, bicameral Legislature, and a judicial system composed of a superior and a supreme court.⁷⁵ Elected mayors head local island governments for Saipan, Tinian, Rota, and the Northern Islands.⁷⁶

Just as they had been for the Micronesian status negotiations, property issues were a critical and difficult component of the Covenant discussions.⁷⁷ Article VIII states that, upon signing of the Covenant, all Northern Marianas land that had been part of the Trust Territory would transfer to the newly created CNMI government upon the cessation of the Trust.⁷⁸ The agreement reserved to the U.S. government, by lease, 20,000 acres on Tinian and Saipan for defense purposes.⁷⁹ Finally, section 805 recognized the importance of land

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- Applicability of United States constitutional and statutory provisions including the CNMI's exemption from federal immigration, customs, and minimum wage laws;
 - The creation of the CNMI's own revenue and taxation system
 - The availability of federal financial assistance;
 - Transition of land title from the TTPI to the CNMI and the availability of CNMI lands for federal leasing;
 - Recognition of the scarcity and special importance of land resources to the people of the CNMI;
 - Representation of the CNMI by its own official in the U.S. Congress; and
 - Regular consultation between the CNMI and U.S. on all matters affecting the relationship

⁷⁴ Camacho-Romisher, *supra* note 28, at 576.

⁷⁵ *Id.*

⁷⁶ *Id.* at 577.

⁷⁷ Willens & Siemer, *supra* note 34, at 177-78.

⁷⁸ *See* Covenant, *supra* note 67, § 801.

⁷⁹ *Id.* at § 802. Section 802 set aside for lease by the U.S. government nearly 20,000 acres of land on Tinian, Saipan and Farallon de Medinilla. *Id.* The one-time payment for these leases, consisting of nearly \$20 million, constituted the original investment in MPLT. *Id.* The lease was for 50 years, with a U.S. option for another 50. *Id.*

ownership for the culture and traditions of the people of the Islands.⁸⁰ It set forth restrictions on the ownership and alienation of public and private lands in order to protect the CNMI people from exploitation and to promote their economic advancement and self-sufficiency.⁸¹

Article II of the Covenant required the people of the Northern Marianas to formulate and approve a Constitution.⁸² Because this paper focuses on specific provisions for public land management, the Constitution will be examined in the next subsection, entitled “Public Land Management in the CNMI.”

D. CURRENT DEMOGRAPHICS OF THE CNMI

According to the 2000 U.S. Census, the CNMI has a population of nearly 70,000 people, an increase of over seventeen percent from 1995 figures.⁸³ Of the fourteen islands, only Rota, Tinian, and Saipan are substantially populated.⁸⁴ Saipan, the capital and largest of the islands, has a land area of 47.5 square miles and is home to almost ninety percent of the Northern Marianas Islands’ population.⁸⁵ Rota and Tinian have a combined land area of 72 square miles and less than 7,000 residents.⁸⁶ The rest of the islands, collectively known as the Northern Islands, are either sparsely inhabited or uninhabited.⁸⁷ The indigenous population of CNMI is composed of Chamorros and Carolinians totaling 25% of the

⁸⁰ *Id.* at § 805.

⁸¹ *Id.*

⁸² *See* Covenant, *supra* note 67, § 201.

⁸³ UNITED STATES CENSUS BUREAU, POPULATION AND HOUSING PROFILE: 2000, THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, at <http://www.census.gov/prod/cen2000/island/CNMIprofile.pdf> [hereinafter CNMI Census].

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* Pagan is a part of the Northern Islands.

population.⁸⁸ Asians, mainly from China and the Philippines, comprise over 55% of the total population. Other Pacific Island ethnicities, such as Chuukese, Pohnpeians, and Palauans, comprise nearly 7%.⁸⁹ U.S. mainland Caucasians and African-Americans total less than 2%.⁹⁰

The CNMI economy is supported primarily by taxes generated by tourism, garment manufacturing, service companies, and retail stores.⁹¹ Of these, the tourism and garment industries form the backbone of the Northern Marianas' economy. Annual tourism arrivals number more than 500,000 with revenues of over \$600 million.⁹² The garment industry is the Islands' largest employer, with over 17,500 employees.⁹³ Temporary foreign workers comprise approximately 58% of the total CNMI population.⁹⁴

A 1999 estimate places the total employed labor force at 46,590.⁹⁵ Of this total, nearly 75% are non-U.S. citizen contract workers.⁹⁶ The economy is fragile and is primarily influenced by outside markets.⁹⁷ The CNMI government, which employs the majority of the local population, is highly dependent on the tax revenue generated by the tourism and garment sectors. Many

⁸⁸ *Id.*

⁸⁹ CNMI Census, *supra* note 83, at 2.

⁹⁰ *Id.*

⁹¹ Camacho-Romisher, *supra* note 28, at 573.

⁹² Commonwealth Development Authority, at <http://www.cda.gov.mp/tourism.htm>.

⁹³ Burger & Comer, P.C., *CNMI Garment Industry Economic Report 3* (October 3, 2000), at http://www.sgma-saipan.org/stats/er_00.htm. The garment industry in the CNMI has traditionally enjoyed two advantages: tariff-free access to the U.S. market and a low minimum wage of just over three dollars per hour. *See id.* at 4-5.

⁹⁴ *Id.*

⁹⁵ Burger & Comer, *supra* note 93, at 3.

⁹⁶ *Id.*

⁹⁷ Camacho-Romisher, *supra* note 28, at 573.

commentators believe that the January 1, 2005 abolition of the 1974 Multifibre Agreement, which imposed a system of production quotas on the textile industry, will lead to the dissolution of the CNMI's garment industry within the next few years.⁹⁸ The loss of tax revenues from the garment industry is expected to further exacerbate the already tenuous financial position of the CNMI government.⁹⁹ In this economic climate, pressure to tap into new sources of revenue, including the Islands' land and natural resources, is likely to mount. This background is critical to bear in mind when considering the Pagan mining issue. The conception of MPLA as an "autonomous" corporate entity, free from outside influence, does not mesh with the economic and political pressures on the ground level.

III. PUBLIC LAND MANAGEMENT IN THE CNMI

Beginning with the enactment of the CNMI Constitution in 1978 and continuing to the present, public land management in the CNMI has taken on many forms and has been the subject of numerous pieces of legislation. The following section provides a brief overview of this complex, often indiscernible, history.

A. THE CNMI CONSTITUTION – SPECIAL PROVISIONS FOR LAND ALIENATION AND PUBLIC LAND MANAGEMENT

The Commonwealth Constitution was drafted by thirty-nine elected delegates meeting in a constitutional convention on Saipan from October 18 through December 6, 1976.¹⁰⁰ CNMI voters ratified

⁹⁸ See Guy de Jonquieres, *Garment Industry Faces a Global Shakeup*, THE FINANCIAL TIMES, July 19, 2004, at <http://yaleglobal.yale.edu/display.article?id=4269>. The Multifibre Agreement was formally established in 1974 by the U.S., Europe and other wealthy countries to limit the flow of imports from developing countries as a means of safeguarding jobs in developed nations from being shipped overseas. *Id.* In short, its cessation ended the quota system that had traditionally restricted flows of clothing and textiles from Asian countries. China is expected to be the biggest winner because the country's efficient, large-scale, and low-cost operations are expected to give it a significant advantage in the new world market. *Id.*

⁹⁹ See e.g. James Brooke, *Apparel Factories in Saipan are Threatened by the End of Quotas*, THE NEW YORK TIMES, April 12, 2005, at Finance 11.

¹⁰⁰ See Willens & Siemer, *supra* note 35, at 347.

it on March 6, 1977 and it became effective January 9, 1978.¹⁰¹ The U.S. government retained the right of final approval, based on the CNMI Constitution's consistency with the Covenant and the U.S. Constitution, treaties, and laws applicable to the Northern Marianas.¹⁰² In keeping with the Covenant's recognition of the importance of land to the people of the Islands, special provisions dealing with land and natural resources were included.¹⁰³ In many ways, the CNMI Constitution mirrors the U.S. Constitution, setting forth a bill of rights, a due process clause, and a provision for eminent domain.¹⁰⁴ In other ways, however, it diverges significantly. For instance, as part of the bill of rights, the CNMI Constitution guarantees the right of every person to a "clean and healthful public environment in all areas, including the land, air and water."¹⁰⁵ In addition, Article XII, Section 1 limits the acquisition of long-term interests in land to NMDs.¹⁰⁶ Article XIV, Section 1 protects all places of importance to the culture, traditions, and history of the people of the Northern Mariana Islands.¹⁰⁷ Finally, Article XI, Section 1 provides that the CNMI's public lands belong "collectively to the people of the Commonwealth who are of Northern Marianas descent" and establishes a unique, two-entity mechanism for management of this trust, composed of MPLC and MPLT.¹⁰⁸

B. THE MARIANAS PUBLIC LAND CORPORATION

MPLC had five directors, appointed by the Governor with the advice and consent of the Senate.¹⁰⁹ There was at least one director

¹⁰¹ *Id.* at 347, 349.

¹⁰² *Id.* at 348.

¹⁰³ *See* CNMI CONST. art. XIV, § 3.

¹⁰⁴ *See generally id.* art. I.

¹⁰⁵ *Id.* art. XI, § 9.

¹⁰⁶ *Id.* art. XII, § 1.

¹⁰⁷ *See* CNMI CONST. art. XIV, § 3.

¹⁰⁸ *Id.* art. XI, § 1. The two mechanisms were MPLC and MPLT.

¹⁰⁹ *Id.* art. XI, § 4.

from each of the main islands, and at least one woman and one Carolinian on the board.¹¹⁰ Directors were required to be U.S. citizens with clean criminal records and at least two years of management experience, residents of the CNMI for a minimum of five years, and of Northern Marianas descent.¹¹¹ They also had to speak either Chamorro or Carolinian.¹¹² The directors served four-year terms, with the exception of the first two appointed, who served only two years.¹¹³ MPLC was provided all the powers of a corporation under Commonwealth law and required an affirmative vote of a majority of the directors to act.¹¹⁴ The directors had to submit annual written reports to the people of the CNMI describing the management of public lands, the effects of transfers of interests in public land made during the preceding year, and disclosing the interests of the directors in Commonwealth land.¹¹⁵ Finally, MPLC was to be dissolved after the Constitution had been in effect for twelve years and its functions transferred to the executive branch of the government.¹¹⁶

The Constitution set forth fundamental policies for MPLC.¹¹⁷ First, MPLC had to make a portion of public lands available for a homestead program.¹¹⁸ Second, the corporation could not transfer a freehold interest in public land until twenty-five years after the effective date of the Constitution (1978), except for homesteads, use by another public agency, or for land exchanges to accomplish a legally authorized public purpose.¹¹⁹ Third, the corporation could not

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* The author was unable to determine the reasoning behind this provision.

¹¹⁷ *Id.* art. XI, § 5.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

transfer a leasehold interest in public lands exceeding twenty-five years including renewal rights.¹²⁰ Fourth, any lease of public land exceeding five hectares for commercial purposes had to be approved by the Legislature in a joint session.¹²¹ Fifth, MPLC could not transfer an interest in public land located within 150 feet of the high water mark of a sandy beach, except the corporation could authorize construction of facilities for public purposes.¹²² Sixth, the corporation had to adopt a comprehensive public land use plan including priority of uses.¹²³ Finally, at the end of each fiscal year, MPLC was to transfer all moneys from the management of public lands to MPLT, minus the amount necessary to meet reasonable expenses of administration.¹²⁴ MPLT was to be administered by three trustees appointed by the Governor with input from the Senate.¹²⁵ They were to “make reasonable, careful and prudent investments” and were held to strict standards of fiduciary care.¹²⁶

C. POST-MPLC MANAGEMENT OF CNMI PUBLIC LANDS

1. PUBLIC LAW 10-57 ESTABLISHES THE DIVISION OF PUBLIC LANDS

As proscribed by the Constitution, in 1990, the MPLC was eliminated by Executive Order 94-3, and management of public lands was brought under the Department of Land and Natural Resources (“DLNR”).¹²⁷ In 1997, the Legislature passed Public Law 10-57,

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* art. XI, § 6.

¹²⁶ *Id.*

¹²⁷ Exec. Order No. 94-3, 1 C.M.C. § 2001, Commission Comment (2004).

establishing a separate Division of Public Lands (“DPL”) and Board of Public Lands (“BPL”) under DLNR. The Legislature found that “control over public lands is too important a function to the people of the Commonwealth to be left simply to a line department under direct control of the Governor.”¹²⁸ Furthermore, the Legislature found that public land management needed to be overseen by an autonomous board to “bring a broader and more independent perspective to the critical issues of land management.”¹²⁹ DPL was to be headed by a director serving under control of the Secretary of DLNR and the Board.¹³⁰ DPL was designated as the successor to MPLC and the constitutionally imposed duties and policies remained in-tact.¹³¹

Public Law 10-57 did, however, make significant changes to the management scheme of public land management. It adopted six Additional Fundamental Policies (“AFP”) to be given “separate and independent force and effect as statutory law apart from their vitality as constitutional provisions.”¹³² The first three AFPs stated that DPL could not transfer or lease an interest in less than five hectares of public land for commercial purposes to any holder of an interest in contiguous or adjoining land if the combination would total more than five hectares without approval by a joint session of the Legislature.¹³³ AFP #4 prohibited DPL from altering leases subject to legislative approval.¹³⁴ AFP #5 placed restrictions and requirements on land exchanges with private companies for the purpose of maximizing the return on public lands and preventing private parties from “reaping windfall gains from land exchanges at the expense of the

¹²⁸ Public Lands and Natural Resources Act of 1997, Pub. L. 10-57, § 2. This law was subsequently amended by P.L.s 11-48, 12-33 and 12-71. It is unclear from the Commonwealth Code which provisions of P.L. 10-57 are still in effect.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *See generally* Public Lands and Natural Resources Act of 1997, Pub. L. 10-57.

¹³² *Id.* at § 2674.

¹³³ *Id.* at § 2675.

¹³⁴ *Id.*

Commonwealth.”¹³⁵ AFP #6 imposed a thirty day public notice requirement for any lease of public land for commercial purposes.¹³⁶ Although unclear due to the absence of legislative history on P.L. 10-57, these additional fundamental policies apparently were intended to address perceived problems with MPLC’s adherence to its fiduciary responsibilities. The AFPs place numerous controls on DPL’s ability to dispose of public lands, including increased involvement on the part of the Legislature and limitations on private gain from transfers of public land.

2. PUBLIC LAW 11-48 AMENDS P.L. 10-57

In 1998, the CNMI Legislature passed Public Law 11-48 amending P.L. 10-57.¹³⁷ The Legislature found that “the best guarantee of protecting and preserving places of importance to the culture, traditions, and history of the people of the Northern Mariana Islands is to ensure that management of these places, to the maximum extent possible, be first offered to persons of Northern Marianas descent.”¹³⁸ The law required DPL to make good faith efforts to lease public lands to persons of Northern Marianas descent.¹³⁹ Only after such efforts had been made could DPL then open the lands to other

¹³⁵ *Id.*

¹³⁶ *Id.* The notice had to be by publication for four consecutive weeks in a locally circulated newspaper and by postings in the civic center and local government offices. *Id.* Required components included: 1) a description of the property, 2) the proposed lessee, 3) the names of any agents, representatives or attorneys involved in negotiating on behalf of the lessee, 4) a concise statement of the terms and conditions of the proposed lease, 5) identification of all alternative proposals received during the previous five years, and 6) the time, place and manner in which interested persons could present their views. *Id.*

¹³⁷ See generally An Act to Amend Section 2674 of Public Law 10-57 in order to further Protect and Preserve Places Important to the Culture, Traditions and History of the People of the Northern Mariana Islands; and for other Purposes, Pub. L. 11-48, at www.cnmilaw.org/public_laws11.php.

¹³⁸ *Id.* § 1.

¹³⁹ *Id.*

persons or corporations.¹⁴⁰ P.L. 11-48 codified this provision as an amendment to the AFPs of P.L. 10-57.¹⁴¹

3. PUBLIC LAW 12-33 AMENDS P.L. 10-57

On December 5, 2000, House Bill No. 12-257, entitled “Board of Public Lands Act of 2000,” was passed by the Commonwealth Legislature and signed into law as Public Law 12-33 by Governor Pedro Tenorio.¹⁴² The Legislature found that a conflict of interest existed with the placement of DPL and BPL within DLNR because the Secretary, serving at the pleasure of the Governor, had to implement the policies of the administration while also implementing the policies of DPL and its Board.¹⁴³ The Legislature hoped to end this potential conflict of interest by removing DPL from DLNR and establishing it within the Executive Branch as an independent Board of Public Lands.¹⁴⁴ BPL would oversee the Office of Public Lands, headed by a Public Lands Administrator, to implement and enforce the policies of the Board.¹⁴⁵ The language of P.L. 11-48 was eliminated.¹⁴⁶

The new law was not universally embraced, as the Governor’s letter announcing its enactment reveals.¹⁴⁷ In it, he states that it is “difficult to foresee whether this is the best route to resolve the problems that we have encountered and continue to encounter under

¹⁴⁰ *Id.*

¹⁴¹ *Id.* § 2.

¹⁴² Governor Pedro Tenorio, letter accompanying signing of Pub. L. 12-33, December 5, 2000 (on file with author).

¹⁴³ Board of Public Lands Act of 2000, Pub. L. 12-33, § 2 (2000), at http://www.cnmilaw.org/pdf/public_laws/12/pl12-33.pdf.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See id.*

¹⁴⁷ Governor Pedro Tenorio, *supra* note 142.

Public Law 10-57.”¹⁴⁸ He also had constitutional concerns with respect to establishing an independent board to carry out executive functions but left this interpretation to the judiciary.¹⁴⁹ Eventually, he signed the bill into law while simultaneously urging the Legislature to improve it at a later time.¹⁵⁰

Other significant changes included the lessening of the notice requirement for all public land leases.¹⁵¹ The new law required fifteen days’ notice by unspecified means.¹⁵² Alternative proposals did not have to be considered unless previously solicited by public notice.¹⁵³ Additionally, P.L. 12-33 introduced a more thorough provision for the calculation of rental fees, setting minimum annual rent payments for all public land leases at no less than 8% of appraised fair market value.¹⁵⁴

4. PUBLIC LAW 12-71 AMENDS P.L. 10-57 AND P.L. 12-33

Public Law 12-71, passed on November 13, 2001, shortly after P.L. 12-33 by the same Legislature, amended the law yet again. Leaving the majority of P.L. 12-33 unaltered, it established the Marianas Public Land Authority as an independent public corporation within the Executive branch.¹⁵⁵ Rather than a Public Lands Administrator, the new law called for MPLA to be headed by a Board

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See Board of Public Lands Act of 2000, *supra* note 143, § 105(f)(1).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* § 106(d).

¹⁵⁵ An Act to Make Amendments to the Board of Public Lands Act of 2000, Pub. L. 12-71, 1 CMC § 101(a) (2001), *at* http://www.cnmilaw.org/pdf/public_laws/12/pl12-71.pdf.

of Directors headed by a Commissioner and comprised of Deputy Commissioners for each senatorial district.¹⁵⁶

In addition to yet another change in structure, MPLA was given substantially more discretion to manage a support staff and negotiate lease rates.¹⁵⁷ Rather than the 8% minimum established by P.L. 12-33, the MPLA Board could now negotiate leases at a rate not less than 2% of current fair market value in “consideration of the current economic condition of the Commonwealth.”¹⁵⁸ P.L. 12-71 provided a complicated mechanism whereby the lease amount would be brought up to the 8% level through a series of yearly increases.¹⁵⁹

Thus, four sources form the basis of current MPLA structure and policy: Public Laws 12-33 and 12-71, the Constitution and the Covenant.¹⁶⁰ It should be noted that the current edition of the Commonwealth Code Reporter makes numerous mentions of the “technical deficiencies” of P.L. 12-71, casting some doubt on its legality.¹⁶¹

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* § 102.

¹⁵⁸ *Id.* § 101(a). Although not stated in the legislative history, the impetus behind this provision was presumably to enhance the Board’s ability to attract commercial investment through lower lease rates. At the time, the CNMI was suffering financially as a result of the Asian economic crisis, which severely impacted its tourism revenues.

¹⁵⁹ See An Act to Make Amendments to the Board of Public Lands Act of 2000, *supra* note 155, § 106.

¹⁶⁰ MPLA, at <http://www.mpla.gov.mp/About%20MPLA/php>.

¹⁶¹ 1 C.M.C. § 2801, Commission Comment, (year of code unknown) reads:

PL 12-71 became effective November 13, 2001 and contained some technical deficiencies. the first deficiency is the amendment of subsection (a) above without conforming amendments to subsection (b) and the remainder of the act; a global amendment provision was not included in PL 12-71. Additionally, the reference in subsection (a) above to the term of the Board of Directors is unclear and also in conflict with 1 C.M.C. § 2803 (d). Furthermore, it appears that in the last sentence of subsection (a) above, the reference to “offected” should have been “affected.” Finally, the

IV. ANALYSIS

A. PUBLIC LAND MANAGEMENT IN THE CNMI FROM MPLC TO MPLA

As summarized by the previous section, the brief history of public land management in the CNMI is marked by the recognition of the importance of fiduciary management with a corresponding series of failures to achieve this goal. Despite numerous legislative efforts, the underlying problem has yet to be successfully resolved. The next section analyzes the reasons underlying this recurring issue and then examines the structure of the current iteration of public land management in the CNMI: the Marianas Public Land Authority.

1. LEGISLATIVE REMEDIES, CONFLICTS OF INTEREST, AND DECLINING PUBLIC OPINION¹⁶²

A closer look at the language of the numerous public laws modifying the structure of the public land management agency reveals an ongoing theme of legislative dissatisfaction with the management of CNMI public lands. For example, P.L. 10-57 contains a reference to the “conflict of interest” of having the management function directly under the executive branch.¹⁶³ P.L. 11-48, with its leasing preference for NMDs, appears to address the perception that the Division of Public Lands was favoring non-CNMI investors and not accounting for the preservation of lands with historic and cultural value.¹⁶⁴ The hodgepodge nature of the current law reveals a split in

reference in PL 12-67 to “H.B. 12-257” should instead be to “PL 12-33.”

¹⁶² It is critical to note before beginning this discussion that a full analysis is difficult. CNMI legislative history is limited and the available materials contain little in the way of actual legislative discussion. Furthermore, the nature of local politics and the small size of the CNMI make most experts unwilling to speak on the record. What follows is the author’s best effort to summarize the changes and the reasons behind them using the limited resources available.

¹⁶³ See *supra* section (C)(1), for a discussion of the reasons behind the passage of P.L. 10-57.

¹⁶⁴ See generally An Act to Amend Section 2674 of Public Law 10-57 in order to further Protect and Preserve Places Important to the Culture, Traditions and

the Legislature's approach to public land management. While P.L. 12-33, with its strict lease calculation provisions, indicates an attempt to stop sub-value leases, P.L. 12-71 gives much of this financial strictness away by lowering the required lease amount to 2% of the land's appraised value.¹⁶⁵ Finally, 12-71 attempts, with its creation of an "autonomous" corporation, to resolve what appears to be *the* recurring theme throughout the history of public land management in the CNMI: keeping the management entity free from external political and financial pressures.¹⁶⁶

One of the many outside forces thought to have played a role in many of the leasing decisions is the Legislature itself. An ex-CNMI government official, stated that "many land transactions in the past two decades fall short of being reasonable or conducive to benefiting the intended beneficiaries."¹⁶⁷ He alleges that many of the leases requiring legislative approval (those exceeding five hectares) were illegally influenced by current and former legislators for their own private benefit.¹⁶⁸ Another CNMI resident claims that special interests have prevented proper enforcement of existing leases and that lease income has not been properly utilized to benefit NMDs.¹⁶⁹ The letters and articles in the local newspapers during the Pagan

History of the People of the Northern Mariana Islands; and for other Purposes, *supra* note 137.

¹⁶⁵ See generally An Act to Make Amendments to the Board of Public Lands Act of 2000, Pub. L. No. 12-71, 1 C.M.C. § 101 (year of code unknown).

¹⁶⁶ *Id.*

¹⁶⁷ E-mail interview with anonymous source #1, to Blaine Rogers, Student, University of Hawaii William S. Richardson School of Law (March 25, 2005, 09:15:08 PST) (on file with author).

¹⁶⁸ *Id.* See section 4(C) of text discussing *Romisher v. MPLC*, 1 N. Mar. I. Commonw. Rptr. 843 (1983), *infra* note 223, and *Govendo v. MPLC*, N. Mar. I. 482, 487 (1992), *infra* note 232, for examples of conflict of interest allegations against MPLC.

¹⁶⁹ E-mail interview with anonymous source #2, to Blaine Rogers, Student, University of Hawaii William S. Richardson School of Law (March 28, 2005, 16:34:44) (on file with author).

controversy provides additional insight into public opinion regarding the failure of management of the CNMI's public lands.¹⁷⁰

2. MPLA TODAY: MPLC RE-VISITED?

As previously stated, MPLA is an independent public corporation allotted a high degree of discretion to manage the CNMI's public land trust, in addition to other responsibilities. MPLA's mission, as *trustees* for the public lands of the CNMI, is,

[T]o develop and implement a strategic land use plan that promotes *cultural* and economic growth for the benefit of our present and *future generations*. The plan provides for the efficient and effective services in the management, use, disposition and development of our lands for the economic and *social* betterment of our islands.¹⁷¹ (emphasis added)

MPLA identifies its chief responsibilities as the creation and implementation of a homesteading program, the commercial leasing and permitting of idle public lands, designating public land parcels to other government agencies for fulfillment of the public purpose, and the settling of land claims through its Land Compensation Program.¹⁷² P.L. 13-17 ("The Land Compensation Act of 2002") added this last responsibility as a result of the dwindling supply of public land in the Commonwealth.¹⁷³ It authorizes MPLA to incur a public debt to finance private land acquisitions for public purposes, such as public roadways and utility easements.¹⁷⁴ Compensation may be in the form of cash disbursements or land exchanges.¹⁷⁵

¹⁷⁰ See generally the PaganWatch website, at <http://www.chamorro.com/community/pagan/pagan.html>.

¹⁷¹ MPLA website, *Mission Statement*, at <http://www.mpla.gov.mp/About%20MPLA/mission.php>.

¹⁷² *Id.*, *Overview*, at <http://www.mpla.gov.mp/About%20MPLA/aboutmpla.php>.

¹⁷³ *Id.* See also Land Compensation Act of 2000, at <http://www.mpla.gov.mp/Land%20Compensation/landcomp.php>.

¹⁷⁴ *Id.*

Although MPLA has detailed rules in place for its Land Compensation Program, it is unclear whether similar regulations exist for the land leasing process.¹⁷⁶ The CNMI Administrative Procedure Act, which mirrors the U.S. APA, applies to MPLA and sets forth rulemaking procedures.¹⁷⁷ If the Pagan controversy is any indication, however, there is little opportunity for the NMD beneficiaries of the public land trust to effectively participate in and challenge the decisions of the Board.¹⁷⁸

At the time of this writing, MPLA was utilizing the Land Use Plan originally prepared in 1989.¹⁷⁹ A 2005 draft was in progress but not yet finalized.¹⁸⁰ Due to the dwindling inventory of public land, in 2002, MPLA placed an ongoing moratorium on the acceptance of homestead applications for Saipan and Rota.¹⁸¹ A recent article in the *Marianas Variety* indicates that over half of Saipan's public lands are already leased or being used for government purposes.¹⁸² The remaining unused lands are mostly located in mountainous areas, rendering their use for homesteading or commercial leasing more

¹⁷⁵ See *supra* note 173.

¹⁷⁶ This information is not available on the website and numerous requests and interviews have not uncovered any information. This is a ripe area for future research as administrative process may have a direct bearing on the beneficiaries' ability to have their interests recognized. Examples of possible regulations include provisions for public hearings, contested case hearings, and judicial review.

¹⁷⁷ CNMI Administrative Procedure Act, 9 C.M.C. §§ 9101-15 (2004).

¹⁷⁸ See text in Section I regarding the Pagan mining controversy.

¹⁷⁹ E-mail from Ed Arriola, Public Information Officer, Marianas Public Land Authority, to Blaine Rogers, Student, University of Hawaii William S. Richardson School of Law (Feb. 22, 2005, 12:13 PST) (on file with author).

¹⁸⁰ *Id.*

¹⁸¹ See MPLA website, *Homestead*, at <http://www.mpla.gov.mp/homestead/homestead.php>.

¹⁸² Gemma Q. Casas, *Half of Saipan's Public Lands Already in Use*, MARIANAS VARIETY, Apr. 22, 2005. Of the 8,764 hectares of public land, 4,080 were already in use as of 2001. *Id.* Commercial leases comprise 1,273 hectares of this total, with conservation and wildlife areas comprising 783 hectares. *Id.*

difficult.¹⁸³ There are over 3,500 homestead applications pending with MPLA on Saipan alone.¹⁸⁴

B. THE CNMI'S PUBLIC LAND TRUST

Although the CNMI's public land agency has changed form throughout the years, the strict standards of fiduciary care owed by its administrators to the NMD beneficiaries have not. Although it is not entirely clear why or how the fiduciary duty has survived the numerous legislative changes made to MPLC and its successors, it is evident from MPLA's own mission statement that the fiduciary standard originally set forth in the Constitution still applies to it. But what is meant by "strict standards of fiduciary care" and what specific requirements does it impose on MPLA? As the following section will indicate, the CNMI public land trust is a "hybrid" of traditional private and public trust doctrine. Its unique structure, involving two separate management entities, MPLC (now MPLA) and MPLT, provides a critical component for understanding the scope of MPLA's fiduciary obligation.

1. OVERVIEW OF TRADITIONAL TRUST LAW

According to the Restatement (Third) of Trusts,¹⁸⁵ a trust is a "fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons."¹⁸⁶ Although the

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ 7 C.M.C. § 3401 states that the Restatement (Second) of the Law of Trusts is the law of the Commonwealth in the absence of contrary Commonwealth legislation. Section IV of this paper explores traditional trust law principles using the Restatement Third. In the absence of an amendment to the Commonwealth Code, it is unclear which edition a court would select for trust law interpretation.

¹⁸⁶ RESTATEMENT (THIRD) OF TRUSTS § 2 (2003); *see also* GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 1 (rev. 2d ed. 1984) (defining "trust" as "a fiduciary relationship in which one person holds a

trust relationship is one of many forms of fiduciary relationship, the duties of a trustee are more rigorous than those of most other fiduciaries.¹⁸⁷ Within this framework, one characteristic is entrenched: a person in a fiduciary relationship is under a duty to act for the benefit of the other as to matters within the scope of the relationship.¹⁸⁸ Other elements common to most fiduciary relationships include a duty not to compete, a duty not to profit at the expense of the other, a duty of loyalty, and a duty not to delegate the performance of fiduciary duties.¹⁸⁹ Thus, a traditional trust involves three elements:

(1) a trustee, who holds the trust property and is subject to duties to deal with it for the benefit of one or more others; (2) one or more beneficiaries, to whom and for whose benefit the trustee owes the duties with respect to the trust property; and (3) trust property, which is held by the trustee for the beneficiaries.¹⁹⁰

A trust may be created for private or charitable purposes, or for some combination of the two.¹⁹¹

a. PRIVATE TRUSTS

The general purpose of private trusts is “to benefit identified or identifiable beneficiaries in accordance with their respective

property interest subject to an equitable obligation to keep or use that interest for the benefit of another”). The treatise then observes that “a fiduciary relation is one in which the law demands of one party an unusually high standard of ethical and moral conduct with reference to another” and that it “should be first noted that an interest in property is always an element of the trust, ... [which] presupposes described, ascertained or ascertainable property, a defined interest in which is to be owned or held by the trustee.” *Id.*

¹⁸⁷ RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* § 27 cmt. in Subsection (2).

interests in the trust.”¹⁹² The party establishing the trust has considerable latitude in specifying the manner in which a trust purpose is to be pursued.¹⁹³ In order to be valid, however, administrative and other provisions must reasonably relate to the trust purpose.¹⁹⁴ The reasons behind creation of a private trust are limitless. Examples include the avoidance of probate, to providing for successive enjoyment of property over several generations, to “providing property management for those who cannot, ought not or wish not to manage for themselves.”¹⁹⁵ The traditional view of a private trustee’s fiduciary obligation is that it involves maximizing the economic performance of the trust corpus.¹⁹⁶ Wide discretion is usually provided to the trustees in pursuit of this goal.¹⁹⁷

The CNMI public land trust incorporates the three elements of a traditional trust - (1) trustees assigned to manage the trust property for the benefit of one or more beneficiaries, (2) beneficiaries (NMDs) for whose benefit the trustees owe duties with respect to the trust property, and (3) trust property (all the submerged and public lands of the CNMI) held by the trustees for the benefit of the beneficiaries. It resembles a private trust in that it was created to benefit identifiable beneficiaries. Additionally, property management is a common function of private trusts, especially for those beneficiaries unable to manage it themselves. Practically speaking, it would be impossible for the named beneficiaries of the CNMI trust, an ever-increasing group of NMDs, to manage the lands on their own accord. While very useful, the analogy to private trust law, however, is undermined by the fact that the trust property at issue here is publicly-owned and managed for a charitable purpose.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Interview with Randall Roth, Professor of Law, William S. Richardson School of Law (Apr. 13, 2005).

¹⁹⁷ *Id.*

b. CHARITABLE TRUSTS

A trust purpose is charitable “if its accomplishment is of such social interest or benefit to the community as to justify permitting the property to be devoted to the purpose in perpetuity and to justify the various other special privileges that are typically allowed to charitable trusts.”¹⁹⁸ Since the interests of the community vary with time and place, there is no fixed standard to determine what purposes are of such interest to the community.¹⁹⁹ The fundamental distinction between private and charitable trusts is that, in the case of a private trust, property is devoted to the use of specified persons designated as beneficiaries of the trust; in the case of a charitable trust, property is devoted to purposes the law deems appropriately beneficial to the public.²⁰⁰ Charitable trust purposes include: (1) the relief of poverty; (2) the advancement of knowledge or education; (3) the advancement of religion; (4) the promotion of health; (5) governmental or municipal purposes; and (6) other purposes that are beneficial to the community.²⁰¹ It is common for charitable trusts to limit direct benefits to persons of particular national origin or other characteristics or background.²⁰²

The CNMI’s public land trust’s likeness to a charitable trust is clear. First, its purpose is “public” in that it was designed to benefit all NMDs.²⁰³ Critical to this notion is the understanding that, at the time of the formulation of the CNMI Constitution, NMDs were one in the same as the general “public.”²⁰⁴ In addition, the purpose of the

¹⁹⁸ RESTATEMENT (THIRD) OF TRUSTS § 28 gen. cmt. a (2003).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ RESTATEMENT (THIRD) OF TRUSTS § 28 (2003).

²⁰² *Id.* at gen. cmt. f.

²⁰³ CNMI CONST. art. XI, §4.

²⁰⁴ Interview with Jon Van Dyke, Professor of Law, William S. Richardson School of Law (Apr. 15, 2005). However, due to the dramatic shifts in population demographics over the past 20 years the people of Northern Marianas descent are now minorities on their own islands. *See* CNMI Census, *supra* note 83.

trust is so vital that it is devoted in perpetuity.²⁰⁵ Finally, it limits its beneficiaries to those of a particular national origin.²⁰⁶ This charitable trust model, however, while helpful, is still inadequate for our purposes.

c. THE PUBLIC TRUST DOCTRINE

The public trust doctrine emanates from a long history of Roman and English law's treatment of the nature of property rights in rivers, the sea, and the seashore.²⁰⁷ In essence, the doctrine recognizes that certain interests, such as navigation and fishing, had traditionally been preserved for the benefit of the public, and property used for these purposes was distinguished from general public property, which the sovereign could grant to private owners.²⁰⁸ In certain common properties, such as the seashore, highways, and running water, "perpetual use was dedicated to the public."²⁰⁹ Traditionally, the public trust imposed three restrictions on governmental authority: "first, the [trust] property . . . must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses."²¹⁰ How these restrictions have been interpreted and applied varies markedly among jurisdictions in the United States.²¹¹ The public trust doctrine exists independently of statutory protections and, in some states, has been elevated to a

²⁰⁵ See generally CNMI CONST. art. XI.

²⁰⁶ *Id.*

²⁰⁷ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

²⁰⁸ *Id.*

²⁰⁹ *Id.* (quoting W. HUNTER, ROMAN LAW, 311 (4th ed. 1903)).

²¹⁰ *Id.* at 477.

²¹¹ See generally Sax, *supra* note 207, 491-523.

constitutional mandate.²¹² The executive, legislative, and judicial branches all play roles in protecting the public trust resources for present and future generations due to the lack of designated trustees.²¹³ Decisions made to protect public trust resources do not have to follow private trust law principles. In fact, the Alaskan Supreme Court stated that doing so would be counterproductive:

For instance, private trusts generally require the trustee to maximize economic yield from the trust property using reasonable care and skill. But Article VIII [of the Alaska Constitution] requires that natural resources be managed for the benefit of all people, under the assumption that both development and preservation may be necessary to provide for future generations, and that income generation is not the sole purpose of the trust relationship.²¹⁴

The CNMI public land trust claims elements of traditional public trust doctrine within its framework. It reserves all the public land for benefit of its indigenous population and proscribes specific uses for it.²¹⁵ The Constitution also reserves the submerged lands off the coast of the Commonwealth as part of the public lands owned collectively by NMDs.²¹⁶ These submerged lands play a critical role in the “navigable waters” concept implicit in the public trust.²¹⁷ In addition, constitutional provisions prohibiting the sale of the public

²¹² *In the Matter of the Water Use Permit Applications*, 94 Hawai’i 97, 131, 9 P.3d 409, 443 (2000).

²¹³ Van Dyke Interview, *supra* note 204.

²¹⁴ *Brooks v. Wright*, 971 P.2d 1025, 1034 (Alaska 1999); *see also Evans v. City of Johnstown*, 410 N.Y.S.2d 199, 207-08 (N.Y. App. Div. 1978) (rejecting the argument that public trustees governing public trust resources have duties similar to those under a private trust, and concluding that courts have only a limited role to review executive and legislative decisions regarding public trust resources).

²¹⁵ *See generally* CNMI CONST. art. XI.

²¹⁶ CNMI CONST. art. XI, §§ 2, 3.

²¹⁷ The Constitution provides that management of the submerged lands is to be provided by law and not reserved for MPLC/MPLA.

land are in keeping with the public trust concept. Article XIV of the Constitution reserves areas of importance to the culture, traditions, and history of the people of the Islands for protection, preservation, and public access.²¹⁸ Nonetheless, the correlation to the public trust doctrine only extends so far, as the CNMI trust falls outside its parameters in key respects. The trust property as a whole need not be made available for use by the general public, nor must it be maintained for particular types of uses.²¹⁹ In fact, the Constitution *mandates* private use of public land through its institution of homestead and commercial leasing programs.

2. THE CNMI'S "HYBRID" TRUST

The CNMI public land trust thus incorporates many aspects of traditional trust law, including components of private and charitable trusts, as well as the public trust doctrine. It was intended for an identifiable class of beneficiaries as a private trust would be, yet it was established to benefit what was, at the time of its creation at least, the general public. It was devoted in perpetuity to a charitable purpose, but it established a land management scheme which is typically the domain of private trusts. Additionally, it claimed as part of the trust property submerged lands that would normally fall under the principles of the public trust doctrine. The CNMI public land trust is truly a unique "hybrid" of traditional trust law principles.

As such, a clear elucidation of MPLA's fiduciary duties becomes difficult. If the trust is private, then management of the public lands should focus on maximizing the financial return on the property.²²⁰ On the other hand, if the trust is charitable then non-economic considerations (specifically those that benefit the charitable purpose of the trust) are pertinent to MPLA's role as a fiduciary. Lastly, owing to the CNMI Constitution's adoption of public trust principles in Articles XI and XIV, relevant concepts for resource conservation, such as open space preservation and cultural protection, apply as well. The Constitution and subsequent legislation, however,

²¹⁸ CNMI CONST. art. XIV, § 3.

²¹⁹ *See generally* CNMI CONST. art. XI.

²²⁰ Roth interview, *supra* note 196.

have done little to define just what MPLA's fiduciary obligation entails.

The dual management structure of the trust, however, provides the key to this issue. One entity, MPLC, was tasked exclusively with property management.²²¹ MPLT, on the other hand, was to manage the income generated from this management.²²² As co-trustees, the entities possess distinct mandates which implicate different elements of fiduciary care. This concept plays a critical role in the formulation of a heightened standard for MPLA to be discussed *infra*.

C. THE CNMI SUPREME COURT'S INTERPRETATION OF "FIDUCIARY DUTY"

In the absence of legislative guidance, we turn to the courts for direction. Early era decisions by the Commonwealth Trial and District courts paved the way for two CNMI Supreme Court decisions – *Govendo v. MPLC* and *Torres v. MPLC*. These early cases provide valuable insight into the development of the CNMI fiduciary duty rule.

1. EARLY CNMI CASES INVOLVING MPLC

In *Romisher v. MPLC*, Chief Judge Robert Hefner of the Commonwealth Trial Court held that the entire theory of a fiduciary relationship is to accord the beneficiary the undivided loyalty of the trustee.²²³ Romisher sued MPLC as a beneficiary of the public land trust, alleging that two MPLC board members had improperly participated in the board's approval of a land lease.²²⁴ The board members had helped negotiate a land deal involving their own property, a fact which they did not reveal to the rest of the board until just prior to the vote.²²⁵ With their votes supplying the needed

²²¹ CNMI CONST. art. XI, § 3.

²²² *Id.* at § 6.

²²³ *Romisher v. MPLC*, 1 N. Mar. I. Commonw. Rptr. 843 (1983).

²²⁴ *Id.* at 844.

²²⁵ *Id.*

majority, the two board members were in position to receive substantial remuneration for their property.²²⁶

In response, Judge Hefner stated that “the members of the board of directors of MPLC must perform their duties honestly, faithfully, and refrain from activities which will interfere with the proper discharge of their duties.”²²⁷ When acting in a fiduciary capacity, one cannot circumvent these responsibilities by merely disclosing a conflict of interest.²²⁸ Judge Hefner also interpreted the CNMI public land trust structure in *MPLT v. MPLC*.²²⁹ In a memorandum opinion, he characterized MPLC and MPLT as “co-trustee[s],” with MPLC receiving funds for public lands and MPLT acting as a depository for the funds.²³⁰ This is significant because the Constitution does not explicitly refer to a dual management composition of an overall “public land trust.” Judge Hefner’s opinion provides an integral component to the appropriate interpretation of MPLA’s fiduciary duties in that it defines for the first time the dual nature of the CNMI’s public land trust while reinforcing the strict standard of fiduciary duty that goes along with its administration.

2. *GOVENDO V. MPLC*

a. FACTS AND PROCEDURAL BACKGROUND

In *Govendo v. MPLC* (“*Govendo*”), Roger Govendo, a minor represented by his father and guardian ad litem Ken Govendo,²³¹ filed a complaint against MPLC, AIBIC International Corporation

²²⁶ *Id.*

²²⁷ *Id.* at 851-52.

²²⁸ *Id.* at 853. According to the court, allowing a fiduciary to circumvent his fiduciary responsibilities merely by disclosing a potential conflict of interest would create a gaping hole in the “armor of protection of a beneficiary.” *Id.*

²²⁹ *MPLT v. MPLC*, 1 N. Mar. I. Commonw. Rptr. 968 (1984).

²³⁰ *Id.* at 969.

²³¹ Presumably, the suit was filed in this fashion because the son was of Northern Marianas descent, thereby making him a beneficiary of the public land trust.

(“AIBIC”), a developer, and the CNMI government.²³² MPLC and AIBIC had entered into a public land lease involving a 40,827-square-meter lot located in San Antonio, Saipan, adjacent to the lagoon.²³³ The lease was for twenty-five years with an option to extend for another fifteen years, subject to legislative approval.²³⁴ AIBIC intended to construct and operate a hotel with at least 250 rooms.²³⁵ Govendo’s complaint alleged three causes of action: first, that the MPLC board’s execution of a lease agreement with AIBIC violated its constitutional duty to act under a strict standard of fiduciary care; second, that the leased area exceed five hectares, therefore requiring legislative approval, which was not obtained, and that the lease was void because it failed to prohibit the erection of any permanent structure within 150 feet of the high water mark; third, that the hotel project proposed by AIBIC would result in unsanitary conditions caused by overburdened utilities, which would deprive him of his constitutional right to a clean and healthful public environment.²³⁶ The CNMI Supreme Court heard the plaintiff’s appeal from the trial court’s granting of the defendant’s Rule 12(b)(6) motion to dismiss for failure to state a claim.²³⁷

The court upheld the lower court’s dismissal of Govendo’s second cause of action claiming the lease between MPLC and AIBIC was invalid.²³⁸ On his cause of action alleging a violation of his

²³² *Govendo v. MPLC*, 2 N. Mar. I. 482, 487 (1992).

²³³ *Id.* at 486.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 487-88.

²³⁷ *Id.* at 490.

²³⁸ The court found that the terms of the lease called for an area less than five hectares and that the failure of the lease agreement to specifically prohibit the erection of a permanent structure within 150 feet of the high water mark did not, by itself, constitute a violation of Article XI, Section 5(e) of the Constitution. *See Govendo*, 2 N. Mar. I. at 498-500. The court examined both the language of the original constitution and the 1985 amendment. *Id.* at 499. The original constitutional language read as follows: “The Corporation may not transfer an interest in public lands located within one hundred fifty feet of the high water mark of a sandy beach.” *Id.* at 500. The 1985 amendment reads: “The Corporation may not transfer an interest, and may prohibit the erection of any permanent structure, in

constitutional right to a clean and healthful environment, the court overruled the dismissal, holding that it was indeed a sustainable claim.²³⁹ Each claim is discussed next.

b. THE COURT'S ANALYSIS OF THE FIDUCIARY DUTY CLAIM

The CNMI Supreme Court held that Govendo's first cause of action, which alleged a breach of MPLC's fiduciary duty, was properly dismissed by the lower court.²⁴⁰ Prior to analyzing Govendo's claim, the court first interpreted MPLC's duty to act in accordance with "strict standards of fiduciary care."²⁴¹

public lands located within one hundred fifty feet of high water mark of a sandy beach, except that the corporation may authorize construction of facilities for public purposes." *Id.* The Court held that, under the new language, MPLC was authorized to prohibit the erection of permanent structure within 150 feet of the high water mark and to authorize construction of facilities within this area only for public purposes. *Id.* at 499. Since the lease agreement did not clearly state whether it encompassed any land within 150 feet of the high water mark, the court held that Govendo had not raised a valid claim. *Id.* The court did, however, hold that despite the absence in the lease of a specific prohibition against any structures within 150 feet of the high water mark, AIBIC had no legal authority to build within this zone. *Id.*

²³⁹ *Id.* at 501. In interpreting Article 1, section 9 of the Constitution (stating that "[e]ach person has the right to a clean and healthful public environment in all areas, including the land, air, and water. Harmful and unnecessary noise pollution, and the storage of nuclear or radioactive material and the dumping or storage of any type of nuclear waste within the surface or submerged lands and waters of the Northern Mariana Islands, are prohibited except as provided by law") to be self-executing, the court held that Govendo, and all persons affected in the CNMI, had a constitutional right to a clean and healthful environment. *See id.* at 501. In addition, the court held that it had the power to enjoin a proposed government or private activity which, if allowed, would "adversely and unconstitutionally affect the cleanliness of the air, land, or water." *See id.* at 502. The issue was not whether AIBIC's proposed hotel would actually cause such a result, but rather whether Govendo's second allegation constituted well-pled facts that stated a claim upon which relief could be granted. *See id.* at 502. The court ruled that Govendo should be allowed to prove his allegation that the building of the hotel would lead to overburdened infrastructure facilities and unsanitary conditions, which would destroy the reef and lagoon area. *Id.*

²⁴⁰ *Id.* at 492-97.

²⁴¹ *Id.* at 490-91 (citing CNMI CONST. art. XI, § 4(c)).

As fiduciaries, members of the board of directors have a duty of loyalty to the people of the Northern Mariana Islands who are of Northern Marianas descent – the direct beneficiaries. The people, as beneficiaries, have entrusted upon the board the duty to act responsibly, honestly, and in good faith. They are to act solely for and in the best interest of the beneficiaries of the trust, to the exclusion of the interest of all others, including their own personal interests.²⁴²

The court, citing *Black's Law Dictionary*, defined “fiduciary duty” as “a duty to act for someone else’s benefit, while subordinating one’s personal interest to that of the other person. It is the highest standard of duty imposed by law.”²⁴³

With the key terminology defined, the court then analyzed all six elements constituting the basis of Govendo’s allegation. First, he claimed that MPLC’s lease of the largest piece of public land on the western side of Saipan constituted a failure to act as a reasonably prudent trustee.²⁴⁴ The court found that nothing in MPLC’s fiduciary duty prevented it from leasing such a parcel.²⁴⁵ Because the lease provided that all rental payments would go to MPLC as trustees for the beneficiaries, the court held that MPLC was not acting contrary to the best interests of the beneficiaries.²⁴⁶ In addition, the court found that Govendo’s allegation failed to state how MPLC had failed to act as a “reasonably prudent trustee.”²⁴⁷ Without more, the mere act of leasing the parcel in question “does not constitute an imprudent act.”²⁴⁸

²⁴² *Id.* at 491 (quoting *Romisher v. MPLC*, *supra* note 223).

²⁴³ *Id.* at 491, note 5 (quoting BLACK’S LAW DICTIONARY, 625 (6th ed. 1990)).

²⁴⁴ *Id.* at 492.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 492-93.

Second, Govendo claimed that MPLC's lease of a large portion of the remaining public land on the western side of Saipan, knowing that there was little public land left on the lagoon, constituted a breach of its fiduciary duty.²⁴⁹ Once again, the court held that this alone did not rise to the level of a breach of MPLC's fiduciary duty.²⁵⁰ "There has to be more alleged, such as, for example, that it is against public policy, or that the land is needed for a public purpose, which would be more beneficial to the beneficiaries."²⁵¹

Third, Govendo alleged that MPLC ignored the fact that there were no outdoor recreation facilities belonging to the people of the CNMI who are of Northern Marianas descent and the leased land was the most logical piece of public land for such a purpose.²⁵² MPLC's failure to consider this, he contended, was a breach of its fiduciary duty.²⁵³ The court again found the allegation to be without merit.²⁵⁴ It held that "MPLC has no affirmative duty to consider the existence, or non-existence, of outdoor recreational facilities before leasing large public lands . . . which may be suitable for that purpose."²⁵⁵

Fourth, Govendo alleged that MPLC's failure to consider, or wrongful consideration of, the best interests of the public in preserving public land for public use represented a breach of fiduciary duty.²⁵⁶ The court ruled that whether public land should be preserved for public use was not a question of fact, but rather one of opinion.²⁵⁷ "While some people may think so, others may feel that public land may be used for private hotels, private golf courses, private farms,

²⁴⁹ *Id.* at 493.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 494.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

cattle pastures, and other non-public uses.”²⁵⁸ No Commonwealth law required that public land be preserved for public use.²⁵⁹ On the contrary, Article XI, Section 5(d) and (g) of the Constitution provided that MPLC may transfer an interest in public land for commercial use and receive compensation for it.²⁶⁰ MPLC’s alleged failure to consider this public interest, even if true, did not constitute a breach of fiduciary duty according to the court.²⁶¹

Fifth, Govendo claimed that MPLC knew that the Director of Land and Natural Resources was a major stakeholder of AIBIC and that the Special Assistant to the Governor was acting as AIBIC’s agent.²⁶² He alleged that these facts constituted a violation of the conflict of interest provisions of the Constitution²⁶³ and, therefore, MPLC’s knowledge and disregard for them amounted to a breach of

²⁵⁸ *Id.* at 494-95.

²⁵⁹ *Id.* at 495.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ CNMI CONST. art. III, § 6 (stating “[t]he Governor or lieutenant Governor may not serve in another Commonwealth position or receive compensation for performance of official duties or from any government body except as provided by Section 5”). Amendment 40 to the CNMI Constitution further states:

Section 1. Code of Ethics. The Legislature shall enact a comprehensive Code of Ethics which shall apply to appointed and elected officers and employees of the Commonwealth and its political subdivisions, including members of boards, commissions, and other instrumentalities. The Code of Ethics shall include a definition of proper conduct for members of the Legislature with conflicts of interest and a definition of the proper scope of debate in the Legislature, shall require disclosure of financial or personal interests sufficient to prevent conflicts of interest in the performance of official duties, shall define the offense or corrupt solicitation of public officials, and shall provide for punishment of offenses by fine and imprisonment.

fiduciary duty.²⁶⁴ The court found that there was no allegation that the Director or Special Assistant had any connection with or influence over MPLC.²⁶⁵ Thus, the constitutional provisions cited by Govendo were inapplicable.²⁶⁶ The court held that mere knowledge of these facts by MPLC was insufficient to constitute a breach of fiduciary duty.²⁶⁷

Sixth, Govendo alleged that the decision making process for the lease was done quickly and purposefully to prevent public hearings or debate and, due to this lack of public input, MPLC violated its fiduciary duty.²⁶⁸ The court held that Govendo's failure to allege that MPLC actually had a fiduciary duty to hold a public hearing was fatal to his claim.²⁶⁹ In addition, Govendo made no allegation that a public hearing was requested, or that a public hearing would have prevented specific acts or agreements contrary to the best interests of the beneficiaries.²⁷⁰

The court, in essence, ruled that MPLC had a duty of loyalty to the beneficiaries of the trust but afforded broad deference to the methods used to achieve that end. This seems to contravene the notion of a constitutionally-mandated "strict standard of fiduciary care," and a dissenting Justice proved to be more sympathetic to the claim withstanding summary judgment.²⁷¹

c. JUSTICE BORJA'S DISSENT

Justice Borja, while concurring in the court's judgment on Govendo's second and third allegations, dissented from its analysis of

²⁶⁴ *Govendo*, 2 N. Mar. I. at 495.

²⁶⁵ *Id.* at 496.

²⁶⁶ *Id.* at 495.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 496-97.

²⁶⁹ *Id.* at 497.

²⁷⁰ *Id.*

²⁷¹ CNMI CONST. art. XI, § 4.

whether his claim for breach of fiduciary duty should withstand summary judgment.²⁷² Besides the constitutional language, Justice Borja cited *Romisher v. MPLC* as the only other case that had addressed this issue.²⁷³ Because of this, he classified it as a “novel” area of the law and argued that the court should be reluctant to dismiss such a case under Rule 12(b)(6).²⁷⁴ ““The Court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or extreme, since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader’s suppositions.””²⁷⁵ Justice Borja found all of the component claims in Govendo’s first allegation to directly or implicitly assert that MPLC had acted dishonestly, unfaithfully, and not in the best interests of the beneficiary.²⁷⁶ In conjunction with the novelty of the issue, Justice Borja found that Govendo’s first cause of action should not have been dismissed.²⁷⁷

Justice Borja’s dissent is important because it recognized both the significance of MPLC’s fiduciary duty and the need for a fact-based analysis of whether this duty was being met. Such an approach, if adopted by the majority, would have provided a foundation for answering the question that still troubles the CNMI today: what is required of the public land management entity under a strict standard of fiduciary care?

d. GOVENDO’S FIDUCIARY DUTY RULE

In affirming the lower court’s dismissal of Govendo’s fiduciary duty claim, however, the Supreme Court said little about the actual standard to which MPLC should be held. Because it was

²⁷² *Govendo*, 2 N. Mar. I. at 504.

²⁷³ *Id.* at 505 (citing *Romisher v. MPLC*, *supra* note 223 at 845).

²⁷⁴ *Id.* at 505.

²⁷⁵ *Id.* at 505-06 (quoting 5A C. WRIGHT & A. MILLER FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1357 (1990)).

²⁷⁶ *Id.* at 508.

²⁷⁷ *Id.* at 506-07.

addressing the issue from the perspective of a Rule 12(b)(6) motion to dismiss, the court focused its inquiry on the inadequacy of Govendo's allegations and said little about the standard or how it should be applied. This is evidenced by the continued references to what Govendo *should have* alleged in order to have survived the defendant's motion for summary judgment.²⁷⁸

A closer look at the court's language, however, offers some insight into MPLC's fiduciary duty. First, the court implies on numerous occasions that MPLC should be granted a high degree of deference to its public land leasing decisions as long as the corporation can show that the lease is financially beneficial to the trust. For example, the court suggests that MPLC's fiduciary duty does not prevent it from leasing the largest piece of public land on the western side of Saipan since the lease calls for financial remuneration that will benefit the trust beneficiaries.²⁷⁹ Second, the court appears to say that MPLC's fiduciary duty does not include an affirmative duty to consider whether, in deciding upon a lease of public land, people of Northern Marianas descent are adequately represented in areas of business for which the land is ideally suited.²⁸⁰ Third, the court implies that MPLC is not obligated to consider the diminishing amount of public land available for public purposes.²⁸¹ Finally, the court states that MPLC has no affirmative duty to ensure public participation in its decision making process.²⁸²

Even though the court did not set forth a bright-line test to guide MPLC in the exercise of its fiduciary duties, one may be inferred from its analysis of Govendo's first cause of action. A characterization of the rule can be summed up as follows: "MPLC has broad discretion under its fiduciary duty to enter into leases for public lands. Regardless of size, location, and the overall amount of available public land, the corporation may dispose of public lands as it sees fit, so long as it can show reasonable financial remuneration for the lease. MPLC has no duty to afford the public a voice in its

²⁷⁸ *Id.* at 492-97.

²⁷⁹ *Id.* at 492-93.

²⁸⁰ *Id.* at 494.

²⁸¹ *Id.*

²⁸² *Id.* at 497.

administrative process.” This deferential standard not only contravenes the CNMI Constitution’s clear intent to elevate public land management to a fiduciary level but also flies in the face of established concepts of fiduciary care. This questionable standard was soon developed, and altered by the court, in *Torres v. MPLC*.

3. *TORRES V. MPLC AND NAKAMOTO ENTERPRISES, LTD.*

a. FACTS AND PROCEDURAL BACKGROUND

In 1993, the year after *Govendo*, the CNMI Supreme Court heard arguments in the case of *Torres v. MPLC and Nakamoto Enterprises, Ltd.* (“*Torres*”). The plaintiff, a well-known legislator from Saipan, opposed a lease agreement entered into between MPLC and Nakamoto for 22,950-square-meters of beachfront public land on Saipan for the construction of a 450-room hotel.²⁸³ Torres brought an action that mirrored the claims of *Govendo*.²⁸⁴ He alleged: (1) that MPLC breached its duty of fiduciary care in the formation of the lease, (2) that the leased property exceeded five hectares, which required legislative approval, and that the lease failed to prohibit construction of permanent structures within 150 feet of the high water mark, and (3) that the construction and operation of the hotel would result in adverse environmental impact, violating his constitutional right to a clean and healthful environment.²⁸⁵ The trial court initially denied the defendants’ Rule 12(b)(6) motion to dismiss for failure to state a claim.²⁸⁶ The plaintiff then renewed his motion for summary judgment, and the court heard the motion on February 26, 1992.²⁸⁷ Rather than ruling on plaintiff’s summary judgment motion, the trial court instead issued an order dismissing plaintiff’s first and second

²⁸³ *Torres v. MPLC and Nakamoto Ent., Ltd.*, 3 N. Mar. I 484, 486 (1993).

²⁸⁴ *Id.* at 489-90.

²⁸⁵ *Id.* at 486-87.

²⁸⁶ *Id.* at 487.

²⁸⁷ *Id.*

causes of action for failure to state a claim.²⁸⁸ The court did, however, find a genuine issue of material fact with respect to plaintiff's third cause of action and ordered the parties to brief the issue of whether the court had jurisdiction.²⁸⁹ After a hearing, the court dismissed it, holding that the Coastal Resources Management agency ("CRM") was the proper agency to address the environmental issue.²⁹⁰

b. THE COURT'S ANALYSIS OF TORRES'
FIDUCIARY DUTY CLAIM

On appeal, the court reviewed two issues: First, whether the trial court erred in dismissing the first cause of action (breach of fiduciary duty) pursuant to Rule 12(b)(6), and, second, whether the trial court lacked jurisdiction over the third cause of action (breach of constitutional right to a clean and healthful environment).²⁹¹ On the jurisdictional issue, the supreme court held that CRM's permitting authority did not pre-empt it from considering "whether the lease, if carried out, would have an unremediable impact on the environment."²⁹² Regardless of whether the proposed hotel would have the environmental impact that plaintiff claimed it would, Torres' cause of action was not premature for adjudication by the court.²⁹³

Although patterned after Govendo's claim, Torres alleged that MPLC failed to consider the best interests of the public in preserving land for public use by "ignoring the intent and wishes of the public to have the area preserved for a public park as expressed by their elected representatives in resolutions adopted by the Sixth Legislature,

²⁸⁸ *Id.* at 487-88.

²⁸⁹ *Id.* at 488.

²⁹⁰ *Id.* CRM is the CNMI government agency that is responsible for promoting the conservation and wise development of coastal resources. See CRM Website, at www.crm.gov.mp.

²⁹¹ *Torres*, 3 N. Mar. I at 489.

²⁹² *Id.* at 492.

²⁹³ *Id.* at 492.

Seventh Legislature, and the Saipan Legislative Delegation and submitted to MPLC.”²⁹⁴ Torres also alleged that MPLC knew that the appraised value of the land was inaccurate and, therefore, the lease did not reflect the best interests of the people of the CNMI.²⁹⁵ These additional allegations convinced the court that Torres’ cause of action should have survived the motion for summary judgment.²⁹⁶

In regard to the plaintiff’s first allegation, the court found that,

[t]his allegation is significant because MPLC, as a trustee, has an *affirmative duty to consider whether an expression has merit or not*. Here, it chose not to give any consideration to such expression MPLC, as a fiduciary, must consider legitimate public expressions made with respect to public land disposition before it takes final action thereon.²⁹⁷ (emphasis added)

The court also held that Torres’ allegation that MPLC could have negotiated better terms of the lease may have merit. “MPLC, although an autonomous agency of the government, may not do as it pleases when leasing out public lands. It must comply with the highest standards expected of fiduciaries.”²⁹⁸ For these reasons, the court overturned the lower court’s ruling dismissing plaintiff’s first cause of action and remanded the case for further consideration.²⁹⁹ It is unclear what occurred when the case was remanded to the lower court.

c. CRITICISM OF THE GOVENDO/TORRES RULE

The *Torres* decision seems to raise slightly the looser fiduciary duty standard established by the Court in *Govendo*. The supreme

²⁹⁴ *Id.* at 490.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 491.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 492-93.

court, perhaps due to the more specific factual pleadings in *Torres* and changes in the composition of the court, imposed a slightly more rigorous standard on MPLC. If the public expresses its will for the public use of public land, then this expression must be considered as part of MPLC's decision making process.³⁰⁰ In addition, the court stated that MPLC's financial arrangements are subject to less deference and more scrutiny.³⁰¹ Indeed, MPLC is now held not only to the "high" standard espoused in *Govendo*, but the "highest standards expected of fiduciaries."³⁰² The court effectively raised the bar for MPLC, which now must consider public expressions while ensuring that its financial agreements reflect current market value for the leased land. The court, however, did not define "public expressions."

Still, the court said little about how this changed the underlying test. The standards are now the "highest" but what exactly does that mean on an operational level? What types of "expression" must the current Board consider? Does the expression have to be in the form of a legislative declaration? Or do a certain amount of letters to the local newspapers, a website, and attendance at MPLA Board meetings constitute a legitimate expression? Apparently, the deferential standard of *Govendo* still applies, even though it appears to flout the very notion of fiduciary care. While the court provided slightly more illumination in *Torres*, it left numerous questions regarding MPLA's fiduciary duty unanswered.

Bearing in mind the earlier analysis of traditional trust and public trust doctrine, this paper argues that the CNMI court has established far too low a standard for MPLC's obligation of fiduciary care. This hybrid trust encompasses aspects of private, charitable and the public trust and, as a result, unfettered deference to financial performance is erroneous. This is the purview of private trusts, where economic considerations trump all others. In a hybrid trust with a far more complex mandate, this is an inappropriate standard. To manage the public lands for the collective benefit of its beneficiaries, MPLC/MPLA should be *obligated* to perform a far more in depth inquiry. Failure to do so would negatively impact the Board's other

³⁰⁰ *Id.* at 491.

³⁰¹ *Id.*

³⁰² *Id.* at 492.

mandates.³⁰³ For example, focusing on leasing as much public land as possible for commercial purposes would undoubtedly (and actually has) negatively impact MPLA's ability to administer the homestead program. Furthermore, article XIV of the Constitution requires the preservation of places of cultural and social importance to the people of the CNMI.³⁰⁴ Ignoring this provision by shortsightedly pursuing economic gain would lead both to a breach of fiduciary duty as well as a breach of the Constitution.

D. COMPARABLE TRUSTS

Having determined that traditional and public trust principles are only partially applicable to the CNMI's hybrid trust and with limited guidance from the CNMI courts, it is useful to examine some comparable trusts for guidance. Because every trust is unique, however, it should be noted at the outset that analogies are problematic. Each trust needs to be evaluated pursuant to its governing document and in the relevant social and political context.³⁰⁵

1. A SAMPLING OF POTENTIALLY ANALOGOUS TRUSTS

A brief survey of potentially analogous trusts reveals no clear match for the CNMI's public land trust. One such similar trust is the responsibility maintained by the U.S. on behalf of numerous Indian tribes as part of the federal government's trust administration of tribal resources.³⁰⁶ The federal government administers all funds required to be deposited in the U.S. Treasury by treaty, statute, or contractual provision.³⁰⁷ The funds are invested, in a manner designed to

³⁰³ See generally CNMI CONST. art. XI.

³⁰⁴ CNMI CONST. art XIV.

³⁰⁵ Van Dyke interview, *supra* note 204.

³⁰⁶ See generally FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 553-62 (Rennard Strickland et al., eds, 2d ed. 1982) (describing the relationship between the federal government and the Indian tribes).

³⁰⁷ Van Dyke interview, *supra* note 204.

maximize the rate of return, on an individual tribal basis in certificates of deposit.³⁰⁸ The U.S. has been periodically sued for mismanagement of these funds and for failure to maximize the return on investment.³⁰⁹

Another potentially analogous trust is the relationship between certain states and their public school systems. Upon admission to the Union, some states received lands designed to be used to generate revenue to support public schools.³¹⁰ The state acts as a trustee and is “required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity.”³¹¹ In Nebraska, trust lands are administered by the Board of Educational Lands and Funds, which has five members, appointed by the governor and confirmed by the legislature.³¹² Meeting monthly, they have the responsibility of managing 1.45 million acres of land, collecting rent from leases and selling and trading land when appropriate. Nebraska courts have stated that decisions by this Board “must be consonant with the duties and functions of a trustee acting in a fiduciary capacity.”³¹³ This duty also limits what the state legislature can require the Board to do.³¹⁴ The underlying element of the state’s fiduciary duty is the maximization of financial return from the trust properties, subject to basic precautions for the preservation of the trust.³¹⁵

Public utility or facility trusts are also somewhat akin to the CNMI’s public land trust. In Louisiana, the Louisiana Public Facilities Authority (“PFA”) was established by statute to help

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *State v. Cooley*, 56 N.W.2d 129, 133 (Neb. 1952) (internal quotations omitted).

³¹² *Cooley*, 56 N.W.2d at 133-34.

³¹³ *Pettijohn v. State Bd. of Educational Lands and Funds*, 281 N.W.2d 901, 904 (Neb. 1979).

³¹⁴ See, e.g., *State ex rel Belker v. State Bd. of Educational Lands and Funds*, 171 N.W.2d 156 (Neb. 1969) (striking down an act requiring the Board to sell its lands when leases expired).

³¹⁵ *Pettijohn*, 281 N.W.2d at 904 (internal quotations omitted).

finance public improvements and was funded by fees generated by the issuance of bonds and investment earnings.³¹⁶ The Louisiana Supreme Court described this trust as a “hybrid” of an active and a charitable trust and characterized the PFA as a public entity, though not a government unit.³¹⁷

While the three trusts discussed above all resemble, in some capacity, the trust relationship between MPLA and NMDs, none offer a completely viable comparison. Both the state/public school trusts and the federal government/Indian trusts call for the maximization of financial return as the critical element in the trustee’s fiduciary duty. The public utility trust of Louisiana, while similar in its “hybrid” quality, says little about what fiduciary duties are involved in the administration of such a trust.

Shifting the analysis to one of the CNMI’s island brethren, the State of Hawai’i, provides a far more analogous and helpful trust from which to extract a fiduciary duty rule for the CNMI.

2. DEPARTMENT OF HAWAIIAN HOMELANDS AND OFFICE OF HAWAIIAN AFFAIRS

Perhaps the most apt comparison for CNMI’s public land trust can be found in Hawai’i’s Department of Hawaiian Homelands (“DHHL”) and Office of Hawaiian Affairs (“OHA”). Hawai’i and the CNMI share similar histories of U.S. occupation, political affiliation, and marginalization yet special recognition of the indigenous population. The split management structure of the trusts is comparable as well. Although a comprehensive analysis of the history of Hawaiian land is too complex to undertake here, a brief background and overview of these two entities follows as a foundation for this paper’s proposition that the CNMI public land trust demands a heightened standard of fiduciary duty.

³¹⁶ See e.g. *Louisiana Public Facilities Authority v. Foster*, 795 So.2d 288 (La. 2001).

³¹⁷ See *id.* at 295-98.

a. OFFICE OF HAWAIIAN AFFAIRS

When Hawai'i achieved statehood in 1959, the United States ceded to the new State almost all of the Hawaiian lands to which the federal government held title.³¹⁸ At the same time, the U.S. imposed obligations upon Hawaii with respect to this land.³¹⁹ In particular, it specified that such land, and the income from it:

shall be held by [Hawaii] as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians ... for the development of farm and home ownership ..., and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of [Hawaii] may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.³²⁰

The Hawai'i Constitution declared that a portion of the public lands conveyed by section 5(b) of the Admissions Act would be held as a "public trust for Native Hawaiians and the general public."³²¹ The Hawai'i legislature subsequently established OHA to "serve Native Hawaiians and Hawaiians."³²² OHA is funded in part by a share of the income produced by the public land trust created out of the section 5(b) lands.³²³ Among the lands conveyed by section 5(b) were lands

³¹⁸ *Price v. Akaka*, 928 F.2d 824, 825 (9th Cir. 1990); see also Hawaii Admission Act, Pub.L. No. 86-3 § 5(b), 73 Stat. 4, 5 (1959), as amended by the Hawaiian Omnibus Act, Pub.L. No. 86-624, 74 Stat. 411 (1960).

³¹⁹ *Price*, 928 F.2d at 825.

³²⁰ Hawaii Admission Act, Pub.L. No. 86-3 § 5(f), 73 Stat. 4, 6 (1959).

³²¹ HAW. CONST. Art. XII, § 4.

³²² *Price*, 928 F.2d at 825-26 (citing HAW. CONST. Art. XII § 6).

³²³ *Id.* at 826.

known as Hawaiian “homelands.”³²⁴ The Hawaiian Homes Commission Act (“HHCA”), originally a pre-statehood agreement between the U.S. and Hawai’i, strictly limits the manner in which the homelands may be managed.³²⁵ Thus, the public land trust created by the Hawai’i Constitution does not include the homelands.³²⁶

OHA is governed by nine elected trustees.³²⁷ Although it is frequently characterized as a government agency rather than as a trust, its operations have been challenged regarding whether they meet fiduciary standards.³²⁸ In *Price v. Akaka*, the Hawai’i Supreme Court consistently referred to the OHA Board as “trustees” and afforded standing to Native Hawaiian plaintiffs deemed to be “beneficiaries.”³²⁹ A recent U.S. Supreme Court ruling, however, characterizes OHA as a state agency rather than as a trust.³³⁰

OHA bears some resemblance to the CNMI public land trust. It has similar, but more explicitly defined, goals intended to benefit

³²⁴ *Id.* at 826, n.1.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Rice v. Cayetano*, 528 U.S. 495, 509 (2000).

³²⁸ Van Dyke interview, *supra* note 204.

³²⁹ *Price*, 928 F.2d at 824-30.

³³⁰ *See Rice v. Cayetano*, 528 U.S. 495 at 499. In *Rice*, the Court held that:

(1) limiting voters to those persons whose ancestry qualified them as either a “Hawaiian” or “native Hawaiian,” as defined by statute, violated Fifteenth Amendment by using ancestry as proxy for race, and thereby enacting a race-based voting qualification; (2) exclusion of non-Hawaiians from voting for OHA trustees was not permissible under cases allowing differential treatment of certain members of Indian tribes; (3) voting qualification was not permissible under cases holding that one-person, one-vote rule did not pertain to certain special purpose districts; and (4) voting qualification was not saved from unconstitutionality on theory that voting restriction merely ensured an alignment of interests between fiduciaries and beneficiaries of a trust. *Id.*

the indigenous population. Failure to manage the ceded lands for these purposes may result in a breach of trust that, presumably, would center on the board's fiduciary duty to satisfy the terms of the trust. The Admissions Act even provides a private right of action to beneficiaries for a breach of the trust that.

OHA, however, is best utilized as a foundation for understanding a trust more comparable in form and purpose to the CNMI's "hybrid" public land trust. The next section examines the Department of Hawaiian Homelands and the trust created by the Hawai'i Homes Commission Act.

b. DEPARTMENT OF HAWAIIAN HOMELANDS

In 1921, the U.S. Congress passed the HHCA, creating the Hawaiian Homes Commission ("Commission") and designating approximately 200,000 acres (the Hawaiian homelands) for the "welfare and rehabilitation of Native Hawaiians."³³¹ The HHCA empowered the Commission to lease parcels of lands to Native Hawaiians at nominal rates.³³² Although the purpose of the HHCA has been debated, most agree that its primary goal was to rehabilitate the declining Native Hawaiian population by facilitating their access to farm and homestead lands.³³³ Upon its admission to the Union in 1959, responsibility for the administration of the Hawaiian homelands was transferred to the State.³³⁴ DHHL, headed by the nine-member Commission, received exclusive control of the Hawaiian homelands per section 204 of the HHCA.³³⁵

DHHL's mission is "[t]o manage the Hawaiian Home Lands trust effectively and to develop and deliver land to native Hawaiians.

³³¹ *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission*, 588 F.2d 1216, 1218 (9th Cir. 1978).

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.* (citing Section 4 of the Hawaii Admission Act, Pub.L. No. 86-3, § 4, 73 Stat. 5 (1959)).

³³⁵ See generally *Ahuna v. Dept. of Hawaiian Homelands*, 64 Haw. 327, 640 P.2d 1161 (1982).

We will partner with others towards developing self-sufficient and healthy communities.”³³⁶ The goal of the department’s five year strategic plan (2003-2008) is to provide every qualified Native Hawaiian “beneficiary” on the waiting list an opportunity for home ownership or land stewardship.³³⁷

E. *AHUNA V. DHHL* – THE FIDUCIARY DUTY OF A LAND TRUSTEE

1. FACTS AND PROCEDURAL BACKGROUND

In the 1981 case *Ahuna v. Dept. of Hawaiian Home Lands* (“Ahuna”), DHHL appealed from a Third Circuit appellate ruling which directed it, inter alia, to issue a lease to the plaintiff of a specific ten acre lot.³³⁸ The appeal stemmed from a lower court ruling, which held that DHHL had violated the HHCA by awarding agricultural lots on a permissive use basis and that the department was obligated to issue leases to available agricultural tracts to all Native Hawaiian applicants qualified to perform the conditions of the lease.³³⁹

2. DHHL’S FIDUCIARY DUTY AS INTERPRETED BY THE HAWAII SUPREME COURT

The court in *Ahuna* ruled that the U.S. Congress created DHHL as part of its obligation as trustee toward the Native Hawaiian people and that the State of Hawai’i assumed this responsibility upon statehood.³⁴⁰ The court provided a detailed analysis of the legislative history of the HHCA, finding that, at the time of enactment, the federal government stood in a trust relationship to the aboriginal

³³⁶ See DHHL website, at <http://www.state.hi.us/dhhl/>.

³³⁷ *Id.*

³³⁸ *Ahuna*, 64 Haw. at 327, 640 P.2d at 1161.

³³⁹ *Id.* at 329.

³⁴⁰ *Id.* at 338.

people.³⁴¹ The State of Hawai'i assumed this commitment when it entered into a compact with the U.S. to assume the management and disposition of the Hawaiian homelands and to adopt the HHCA as a provision of the State Constitution.³⁴² Additionally, the State reaffirmed this compact by adding another provision to the Constitution whereby it accepted "specific trust obligations" relating to the management of the Hawaiian homelands imposed by the federal government.³⁴³

After establishing the existence of this fiduciary duty, the court then set out to determine whether DHHL had breached this duty.³⁴⁴ It began its analysis by looking to the federal government/Indian relationship for guidance. In citing *Seminole Nation v. United States*, the court found that, when the government charges itself with the "moral obligations of the highest responsibility and trust," its conduct should be judged by "the most exacting fiduciary standards."³⁴⁵ This language means that courts should strictly scrutinize the actions of the government, holding it to the same strict standards applicable to private trustees.³⁴⁶

The court sets forth two specific trust duties for DHHL: (1) the obligation to administer the trust solely in the best interests of the beneficiary; and (2) to use reasonable skill and care to make the trust property productive, or simply to act as an ordinary prudent person

³⁴¹ *Id.* at 336.

³⁴² *Id.* at 337 (citing the Hawai'i Admission Act of March 18, 1959, Pub. L. No. 86-3, § 4, 5 (1959)).

³⁴³ *Id.* Article XII, § 2 of the Constitution reads:
 "The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States, relating to the management and disposition of the Hawaiian home lands, . . . the State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian home projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out." *Id.*

³⁴⁴ *Id.* at 338.

³⁴⁵ *Id.* at 339 (internal quotation omitted).

³⁴⁶ *Id.*

would in dealing with his own property.³⁴⁷ Finding that DHHL had neither properly considered the interests of the beneficiaries nor acted as a reasonably prudent person would have, the court found that the department had breached its fiduciary duty of loyalty.³⁴⁸

3. FORGING A HEIGHTENED STANDARD - APPLYING *AHUNA* TO THE CNMI TRUST

Although *Ahuna* is not, of course, authoritative in the CNMI, due to the similarity of the trusts, the *Ahuna* standard for DHHL is informative in a discussion of MPLA's fiduciary duty. The State of Hawai'i and the CNMI each assumed a land trust obligation for its indigenous people via constitutional provisions and assigned this duty to a government entity to which strict standards of fiduciary care apply.

In conjunction with the earlier discussion of the CNMI's public land trust's hybrid, split-management set up, the *Ahuna* standard represents the final piece of the fiduciary duty puzzle. When applied to the CNMI trust, the standard establishes that MPLA must manage the public lands as a reasonably prudent person would manage his or her own, exclusively for the benefit of the NMD beneficiaries. While the CNMI Supreme Court, in *Govendo* and *Torres*, framed this as a subjective issue and therefore deserving of judicial deference, an analysis of the language and foundational principles of the trust reveals that the constitutional directive involves much more than financial considerations. MPLA's fiduciary duty encompasses facets of traditional private and charitable trusts, as well as public trust principles, and this means that "benefit" must be interpreted to include a broad range of factors beyond economics. To illustrate this point, consider that, in addition to commercial leasing, MPLA is obligated to manage a homestead program from the same limited pool of public lands. If MPLA were to lease as much of the public land as possible in order to maximize the economic value of the trust, then there would be no more land for homesteads. In fact, this scenario has already come to fruition with the suspension of the homestead program on Saipan and Rota because of a dwindling

³⁴⁷ *Id.* at 340.

³⁴⁸ *Id.* at 342-43.

supply of land. Clearly, the framers of the CNMI Constitution could not have intended for commercial leasing to preclude the beneficiaries of the trust from having access to homesteads.

The Pagan controversy brought issues like these to the surface. One of the primary arguments advanced by PaganWatch and other opponents of Azmar's proposal was that Pagan was of cultural and historical significance and that the displaced residents still hoped to return. In addition, the group, through its numerous editorials and letters to the editor, raised concerns about MPLA board members' alleged conflicts of interest, their secret dealings with Azmar officials, and questionable financial decisions to illustrate that MPLA was not operating anywhere close to a strict standard of fiduciary duty. The uncomfortable reality is that the CNMI Supreme Court, when presented with the opportunity to establish an appropriately high standard of fiduciary duty, refused to do so. With the possibility of a permit still under consideration, a heightened standard must be adopted now in order to preclude an incomplete consideration of the issues involved with a massive mining project.

This paper proposed that the CNMI Legislature should impose upon MPLA a standard of fiduciary duty that explicitly adopts the following elements: (1) the preservation of open space for public access and/or future homestead use; (2) the implementation of a "no tolerance" conflict of interest policy; (3) a commitment to improving administrative processes, such as public notice and open public meetings, thereby allowing the NMD beneficiaries an avenue for direct participation; (4) a commitment to article XIV of the Constitution, accounting for preservation of places of cultural and historical significance; and (5) a commitment to article I, section 9 of the Constitution entitling all CNMI residents to a clean and healthful environment. With the court unlikely to address the issue any time soon and MPLA seemingly unwilling to do so, the Legislature is left with the responsibility of defining, once and for all, what the CNMI Constitution meant when it imposed the seemingly clear but hard to implement standard of fiduciary duty.

V. CONCLUSION

On February 22, 2006, subsequent to the original draft of this paper, the CNMI legislature dissolved MPLA through the Public Lands Act of 2006. This Act created, once again, a Division of Public Lands within the Executive branch and transferred all of MPLA's

responsibilities to this agency.³⁴⁹ Section 2 of the Act states that, “[t]he Commonwealth’s experience with the management of public lands over the years has demonstrated the need for additional controls to ensure that this valuable resource is administered in compliance with the requirements and fiduciary duties imposed by the Constitution.”³⁵⁰ The Act repealed Public Laws 10-57, 12-33, and 12-71.³⁵¹ While this change has an obvious impact on much of the analysis contained herein, it does not render the need for a higher standard of fiduciary duty irrelevant. If anything, the CNMI’s continued struggle to create an entity capable of successfully managing its public lands in accordance with its constitutional mandate shows that a heightened standard is as important, if not more so, than ever.

The scope of fiduciary duty implicit in the management of the CNMI’s collectively-owned public lands is far broader than either the responsible agencies or the CNMI Supreme Court has interpreted it to be. Rather than the economically-based, deferential standard in place now, the foregoing analysis has shown that the CNMI Constitution requires a higher standard of fiduciary management from its public land management entity. Applying elements of traditional trust law, public trust doctrine, and incorporating concepts from a similar Hawaiian trust, a standard emerges that is particularly appropriate to this unique hybrid trust. To manage this trust in accordance with the trust instrument, MPLA needs to adhere to a standard of fiduciary duty that re-affirms its commitment to constitutional principles, eliminates improper influence, incorporates administrative process, and preserves open space. The sustainable future of the CNMI public land trust depends on it.

³⁴⁹ See Public Lands Act of 2006, Pub. L. No. 15-2, at http://www.cnmilaw.org/public_laws15.php.

³⁵⁰ *Id.*

³⁵¹ *Id.*

Japan's Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings[♦]

David T. Johnson^{*}

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I. ABSTRACT

The secrecy that surrounds capital punishment in Japan is taken to extremes not seen in other nations. This article describes the Japanese state's policy of secrecy and explains how it developed in three historical stages: the "birth of secrecy" during the Meiji period (1867 – 1912); the creation and spread of "censored democracy" during the postwar Occupation (1945 – 1952); and the "acceleration of secrecy" during the decades that followed. The article then analyzes several justifications for secrecy that Japanese prosecutors provide. None seems cogent. The final section explores four

[♦] The field research for this article was conducted in Japan from August 2003 to May 2004. In addition to the sources listed in the footnotes, the article relies on interviews conducted with Japanese criminal justice professionals and capital punishment informants, including 16 prosecutors, 21 defense attorneys, 5 judges, 12 professors, 10 journalists, 5 politicians, 3 police officers, 6 members of the clergy, and various students, citizens, and activists. Many of the interviewees were guaranteed anonymity. Death penalty research was also conducted in China (two weeks), Taiwan (one week), and South Korea (two weeks).

^{*} David T. Johnson is Associate Professor of Sociology and Adjunct Professor of Law at the University of Hawaii. He is the author of *The Japanese Way of Justice: Prosecuting Crime in Japan* (Oxford University Press, 2002).

meanings of the secrecy policy that relate to the sources of death penalty legitimacy, the salience of capital punishment, the nature of Japan's democracy, and the role and rule of law in Japanese society.

[T]he purpose of secrecy is, above all, protection.

Georg Simmel¹

II. "REIKO IN WONDERLAND"

On 19 September 2002, Reiko Oshima, a member of the progressive but unpopular Social Democratic Party and a Member of Parliament in Japan's Lower House, visited the warden of the Nagoya Detention Center and tape-recorded the following conversation.² It was the day after convicted murderer Yoshiteru Hamada had been executed in the same Nagoya facility, and the warden, Tsukasa Yoshida, was one of a handful of state officials who witnessed the hanging. By Ministry of Justice policy, no "private persons" were allowed to attend.

Oshima: What about Mr. Hamada?

Yoshida: Who's Mr. Hamada?

O: Yoshiteru Hamada, the man who was executed here yesterday.

Y: Who said he was executed here yesterday? I have no comment. Where did you hear that?

O: I have heard that members of his family came here, and it has been reported by the mass media, right?

Y: No comment.

¹ THE SOCIOLOGY OF GEORG SIMMEL 345 (Kurt H. Wolff ed. & trans. 1950).

² SHIKAI HAISHI HENSHU IINKAI, SHIKAI HAISHI HOAN 266 (2003).

O: You mean you cannot say that it was Mr. Hamada?

Y: No comment.

O: Warden Yoshida, you are tight-lipped aren't you?

Y: I'm a corrections man, and I've lived my life as a prison official.

O: If you are saying that you did *not* execute Mr. Hamada, then why have you not protested against the newspaper articles that say he was hanged?

Y: I don't know where that came from, but since it has not been verified I have no comment. Now I have a question for you Ms. Oshima. Do you think all news reports are true? Is the news 100 percent accurate?

O: When did the death warrant from the Minister of Justice arrive?

Y: Like I said, no comment. As I keep telling you, if the premise is that there was an execution, I cannot answer your questions.

O: OK then, as a general matter, how many detention center officials participate in an execution?

Y: I don't have a hold on that information, and I don't feel the need to reply.

O: I also heard from a defense lawyer that there was an execution here yesterday.

Y: No comment.

O: Warden Yoshida, how many executions have you been involved in?

Y: No comment...

O: Warden, why don't you acknowledge yesterday's execution?

Y: On what basis are you speaking?

O: You know, yesterday even Minister of Justice [Mayumi] Moriyama responded [to my request for a meeting about Hamada's execution].

Y: Did she say that there was an execution in Nagoya? I heard that you met with the Minister...

O: Minister Moriyama admitted that she signed her second death warrant.

Y: I'm not in a position to speak on this subject...

O: Did you inform Mr. Hamada's family about yesterday's execution? What is the latest news?

Y: No comment...

O: Some people from the world outside cannot meet with inmates on death row because of orders issued by the prison. What do you have to say about this?

Y: My thinking is the same as Warden Kameoka [the previous Nagoya warden]. Meetings with outsiders are forbidden in order to promote the emotional stability of the inmates.

O: This spring I sent a letter [to another death row inmate in the Nagoya jail], but since I have not yet received a reply I don't know if it arrived. Did it reach him?

Y: I don't know. I have not looked into it.

O: Could you please look into it for me?

Y: No comment...

O: I heard from the lead attorney in Gifu prefecture that Mr. Hamada's family came to Nagoya [after the execution].

Y: I don't know.

O: You're trying to make me look like a fool, aren't you? The previous warden, Mr. Kameoka, spoke more straightforwardly about matters like this. I shouldn't make comparisons, but Warden Kameoka wore a grim expression after an execution. You're smiling.

Y: If you pressure me I'm going to get mad. What do you want? For me to look uptight?

O: This winter, will there be stoves to heat the cells in this detention center?

Y: This winter we will do the same as we always do [that is, no heating]...

O: OK, I am submitting this letter of protest to you.

Y: I cannot accept it.

O: Then I'll place it here on the table.

Y: I'm just going to put it through the shredder.

O: Are you saying it will become garbage?

Y: If you pressure me I'll get mad.

O: [Addresses the letter to Warden Yoshida.]

Y: I cannot accept it even if it is addressed to me.

O: [Continues to write...] I'll sign my name too.

Y: I cannot accept it.

O: You know, this is the first time I've met a warden in this

way. I'm not doing it because I'm a Member of Parliament, I'm doing it because I just happened to get this position and the responsibility that comes with it. On the Detention Center's front lines, nothing at all is said about executions. It seems like your plan is to concentrate all information about executions in the Ministry of Justice. In a democratic society, that's not right...

Y: I have no comment about executions.

O: Who told you that you cannot comment about executions?

Y: It's not a matter of who told me. It's because I'm working in the field [at a Detention Center].

O: This conversation is not going anywhere. I'm leaving. [Once again Oshima presents the letter of protest to Warden Yoshida.]

Y: I cannot accept it.

O: Why can't you accept a letter that is addressed to you?

Y: I'm bothered by the way you're treating me.

O: I'm going to place the letter here on the table and leave.

Y: I cannot accept it.

O: Well then, please write "unaccepted" on it.

Y: I don't want to write "unaccepted" on it.

O: [Stands up from her seat and begins to leave...]

Y: [Follows after Oshima and attempts to return the letter to her...]

O: If you touch me that'll be sexual harassment.

Y: What the...[Placing the letter on top of a cabinet in the

hallway...] I'm putting it here.

In February 2004, I interviewed Reiko Oshima for 8 hours in her Nagoya office. By this time she had lost her seat in Parliament but had not lost her passion about capital punishment:

It's like *Alice in Wonderland*, isn't it? Or perhaps we should call it "Reiko in Wonderland." A person has just been killed, journalists have already published the fact [in the previous evening's newspapers], and yet the executioner refuses to acknowledge the reality. Why? Because the state wants to discourage debate about the death penalty and because, frankly, many of the state officials who participate in executions don't like doing it. Still, Warden Yoshida's denials are strange, aren't they? His predecessor, Warden Kameoka, was more forthcoming, and do you know what happened to him? He was transferred from the Detention Center in Nagoya [Japan's fourth largest city] to [the Detention Center in the much smaller city of] Tokushima [on the island of Shikoku]. That's not a promotion. The Ministry of Justice [which is run by prosecutors who control such transfers] does not want prison officials to talk about the death penalty. Those who do get punished. In this sense, silence is professional common sense. Warden Yoshida was just a cog in the state's killing machine, and the Ministry of Justice is both the engine and the driver...Events that day were even stranger than the tape-recording suggests. In fact, while [my daughter] Moe [who, as Oshima's secretary, accompanied her to the Nagoya Detention Center] was taking notes during the conversation with Warden Yoshida, other prison officials were desperately peering over her shoulder trying to see what she was writing. It was so absurd I didn't know whether to laugh or cry.

Nine months before Warden Yoshida's "Who's Hamada?" response, Reiko Oshima did cry when she observed the corpse of another man (Toshihiko Hasegawa) who had been hanged in the same Nagoya gallows. The condemned's sister had permitted Oshima to

photograph her brother's dead body after the state transferred it to her. The photos (which Oshima showed me) reveal large bruises where the rope bit and a neck that was stretched to an unnatural length by the force of the drop and by the 30 minutes that Hasegawa dangled. On 3 April 2002, Oshima showed the photographs to Minister of Justice Mayumi Moriyama and to executive prosecutor Yuki Furuta during a meeting of the Diet's Judicial Affairs Committee. "This is the reality of hanging," Oshima declared as she displayed an image few Japanese had ever seen. "Capital punishment is unconstitutionally cruel." Oshima believes the Minister of Justice was "stunned" by what she saw. On videotape, the woman who had signed Hasegawa's death warrant can be seen staring in silence at the photo for several seconds before replying that she "already knew the death penalty is an extremely severe sanction" and that it therefore "must be administered as carefully as possible."³ In an interview some time later, Furuta, who led the team of prosecutors that selected Hasegawa from a pool of more than 50 death row inmates whose convictions had been finalized by the Supreme Court, told me that Oshima's use of the photographs was "shameful." "It was an affront to the Minister and to me," Furuta fumed, "and it was an insult to the deceased. There is no reason for doing something like that."⁴

³ The Hasegawa case is also notable because Masaharu Harada, the brother of one of the victims, repeatedly urged the Minister of Justice not to authorize execution since he "needed to talk" with the condemned and since he believed that the repentant Hasegawa should continue atoning for his crimes. In the months leading up to the hanging, Harada appeared on several television shows to explain his views and to argue against execution. His face was hidden for fear of retaliation from death penalty supporters. Interview with Masaharu Harada, in Nagoya (2/8/04). Some commentators believe Japanese prosecutors are increasingly adopting a "victim-service" mentality of the kind that is common in the United States. Shinichi Ishizuka, *Shushinkei Donyu to Keibatsu Seisaku no Henyo*, GENDAI SHISO, Mar. 2004, at 170; FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 57 (2003). Although the trend seems to be in that direction, the Hasegawa case suggests there is reason to wonder about the sincerity of some "victim-service" claims. As Harada sees it, "The government cites bereaved families' sentiments as a basis for maintaining the death penalty, but it completely ignored my wish when it executed Mr. Hasegawa." Harada, *supra*.

⁴ Other prosecutors were similarly critical of Oshima's decision to tape-record the conversation with the Nagoya Warden. One called it a "dirty tactic." Interviews, Tokyo (Feb.-Mar. 2004).

A. SECRECY AND SILENCE

But Reiko Oshima does have her reasons, chief of which is the desire to expose the reality of capital punishment in a country where the state kills in secret.⁵ Capital punishment in the United States has become increasingly hidden, privatized, and bureaucratized over the last 150 years⁶, but the secrecy and silence that shroud Japan's death penalty are taken to extremes not seen in other nations. Warden Yoshida's evasions are but one brick in a much larger wall of denial that surrounds the death penalty in Japan. This section summarizes sixteen more.

1. Inmates on Japan's death row are not notified of the date or time of execution until an hour or so before it occurs. Former prison officials suggest that some condemned are extracted from their cells on the ruse that they are "wanted in the office".⁷ At most, the about-to-be-killed are given only enough time to clean their cells, write a final letter, and receive last rites. Death penalty supporters have called this sudden "your-time-has-come" policy a "surprise attack" (*damashi-uchi*). Whatever the nomenclature, what it means is that the condemned live for years not knowing if the present day will be their last. Sakae Menda, who was exonerated and released in 1983 after spending 34 years on death row, had this to say about Japan's prior notification policy: "Between 8:00 and 8:30 in the morning was the most critical time, because that was generally when prisoners were notified of their execution...You begin to feel the most terrible anxiety, because you don't know if they are going to stop in front of your cell. It is impossible to express how awful a feeling this was. I

⁵ Following Scheppele's seminal study, a "secret" is "a piece of information that is intentionally withheld by one or more social actor(s) from one or more other social actor(s)." KIM LANE SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 12 (3rd ed. 1988).

⁶ See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2002); Annula Linders, *The Execution Spectacle and State Legitimacy: The Changing Nature of the American Execution Audience, 1833-1937*, 34 L & SOC. REV. 607 (2002).

⁷ TOSHIO SAKAMOTO, *SHIKEI WA IKA NI SHIKKO SARERU KA* 69 (2003).

would have shivers down my spine. It was absolutely unbearable.”⁸

2. Relatives of the condemned are told of the execution after the fact and are given twenty-four hours to collect the body. Most cadavers go uncollected. Relatives of the victim are not told anything.

3. Defense lawyers receive no prior notification. If they want to postpone an appointment with the hangman, they must guess when to file extraordinary appeals.⁹

4. The Japanese public receives no advance notice of executions. This minimizes protest and limits debate.

5. In some cases, the execution team is not given prior notification, in large part out of fear that if they are told in advance they may not show up for work. When members of the team are given prior notice, they are told the day before, they are ordered not to tell anyone else about the assignment, and they are urged to “be grateful” for receiving such an “honorable assignment.” Executioners are not allowed to refuse the assignment.¹⁰

6. After the condemned has been killed, the state sends news agencies a notification by fax. A typical announcements reads as follows: “Today in Tokyo, two death row convicts were executed.” That is all. The names of the deceased are not revealed (though journalists may learn who they were through backstage conversations), and the fax may not even indicate who is making the announcement. Until 1999, the government did not make any post-execution announcements at all,¹¹ so journalists learned about hangings when attorneys or family members told them a client or loved one was gone. In some cases, death was discovered only after

⁸ Howard W. French, *Secrecy of Japan Executions Is Criticized As Unduly Cruel*, N.Y. TIMES, June 30, 2002.

⁹ Author's interviews with defense lawyers, September 2003 and February 2004.

¹⁰ SAKAMOTO, *supra* note 7, at 35.

¹¹ YUJI HARA, KOROSARERU TAME NI IKIRU TO IYU KOTO: SHIMBUN KISHA TO SHIKEI MONDAI 13 (1997).

mail addressed to the deceased was returned to the sender unopened.¹²

7. No “private persons” are allowed to attend hangings: No journalists, no relatives or friends of the victim, no family or friends of the condemned, no scholars, and no members of the general public. The only persons permitted to witness executions are a handful of state officials: a prosecutor, a prosecutor’s assistant, the warden of the jail where the gallows is located, and members of the execution team.¹³

8. A “spiritual advisor” can attend the hanging but (unlike the situation in the United States) condemned persons in Japan are not free to choose who it will be. Instead, advisors must be selected from a list of state-approved clergy, none of whom is openly abolitionist. Activity that the state deems “political” will result in removal from the list. Proscribed behavior includes actions that could cultivate “hope” in the condemned.¹⁴

9. Citizens and the media are not allowed to view the gallows even when it is not in use. In July 2003, nine persistent Members of Parliament did get a tour of the new Tokyo gallows (before it was ever used), but they were the first outsiders to see where the state kills in at least 30 years. With this as “precedent,” I asked Japan’s Prosecutor General if I could see it too. My request was refused (after six months of deliberation), ostensibly on the grounds that opening the gallows to me could create a precedent that would enable “undesirables” to see it as well.

¹² Author’s interviews with abolitionists and defense lawyers, September 2003.

¹³ “The Japanese image of horror, of dying poorly, is dying alone.” See Susan Orpett Long, *Becoming a Cucumber: Culture, Nature, and the Good Death in Japan and the United States*, 29 J. JAPANESE STUD. 66.

¹⁴ Books like *Dead Man Walking* – a spiritual advisor’s description of how condemned men in Louisiana spent their final days on death row – could not be written in Japan. This may help explain why the book and its author, Sister Helen Prejean, are popular in Japan’s abolitionist circles. SISTER HELEN PREJEAN, *DEAD MAN WALKING. AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1993).

10. Between imposition of a death sentence and physical execution, inmates on death row are socially extinguished through the state's severe restrictions on meetings and correspondence. If one is not a close relative or a defense lawyer, contact with the condemned is all but impossible, and even if one falls into one of the two permitted categories, strict limitations are placed on the frequency, duration, and content of contacts.¹⁵ The state's stated reason for this policy is to promote "stable feelings" (*shinjo no antei*) in the inmates and thereby to help them "prepare for death," but one function of killing socially before killing physically is the facilitation of "smooth" executions in which demoralized inmates do not resist.

11. Prosecutors in the Ministry of Justice select execution dates strategically, to minimize the possibility of *ex-post* protest and debate. Among other calculations, executions almost always occur when Parliament is in recess, usually on a Thursday or Friday (near the end of the "news week" and as people are becoming preoccupied with weekend activities). Execution dates are also selected to achieve "justification by association." In August 1997, for example, Norio

¹⁵ Conditions on death row are harsh, especially for the condemned who have had their sentences approved by an appellate court. In addition to being detained in almost total isolation, death row inmates are not permitted to stand up, lie down, or move without permission; they must sit and sleep in approved positions; they are not allowed to receive letters from anyone except family members; they are given five to ten minutes to eat each meal; they can exercise outside of their cells (by themselves) just two to three times per week for 30 minutes a session; they may not choose which newspaper to read; foreign books and all calendars are prohibited; their cells are constantly lit; and so on. KOICHI KIKUTA, SHIKEI: SONO KYOKO TO FUJORI 298-300 (1999). In 2006, the Japan Federation of Bar Associations released the results of a questionnaire administered to all of the persons on Japan's seven death rows. Fifty-eight out of 79 condemned inmates (*shikei kakuteisha*) responded. The results reinforce the impression that death row conditions are harsh. As the JFBA's report puts it, "The condemned are not allowed to participate in any group activities...and communication with the outside world is extremely limited." NIHON BENGOSHI RENGOKAI, ANKETO KAITO KEKKA HOKOKU 1, 5 (2006), at http://www.nichibenren.or.jp/ja/committee/list/data/enquete_a.pdf. Although conditions on American death rows are deeply "dehumanizing" too, conditions in Japan seem worse. See Robert Johnson, *Life Under Sentence of Death: Historical and Contemporary Perspectives*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 648 (James R. Acker et al. eds., 2nd ed. 2003); see also SEIJIRO YAMANO, SHIKEISHU NO INORI (1999).

Nagayama, an award-winning writer¹⁶ and Japan's most well-known death-row inmate, was hanged shortly after a Kobe juvenile was arrested for murdering an elementary school boy and placing the victim's severed head on the school's front gate. The Kobe killer was 14 years old. Nagayama, who had lived for 29 years on death row, committed four homicides in 1968 when he was a 19-year-old minor. It appears that prosecutors chose him for execution at this time in order to mobilize support for legislation that would "get tougher" on juvenile offenders.¹⁷ Following Nagayama's execution, The Juvenile Law was revised to make it easier to transfer minors to adult court.

12. The Ministry of Justice provides no explanation or justification for why it selects certain inmates for execution while permitting others to continue living. As of January 2006, 79 persons (including at least three women) had received "finalized" death sentences. By law, any of them could be chosen to die at any time, leading critics to contend that prosecutors are "playing god." Although length of time on death row is apparently one fact the Ministry considers when deciding who to hang next, the other factors remain unclear.

13. Ministers of Justice are appointed by the Prime Minister so as to minimize the possibility of public protest. By law, the Minister (a Cabinet member and almost always an elected politician) must sign a death warrant before an execution can occur (though in practice it is Ministry prosecutors who make the most important decisions about who goes next). In recent years, most Justice Ministers have had no local electoral district. They came instead from the ranks of representatives in the House of Councilors' national district and from "proportional representation" winners in the House of Representatives. It appears locally elected politicians are avoided in part to prevent a "problem" that was common before 1993: abolitionists demonstrating against the death penalty in the Minister's home district.¹⁸

¹⁶ NORIO NAGAYAMA, *MUCHI NO NAMIDA* (1990).

¹⁷ MASAKO SATO, *GYAKUTAI SARETA KODOMOTACHI NO GYAKUSHU: OKASAN NO SEI DESU KA* 13-14 (2001).

¹⁸ Yoshihiro Yasuda, *Kokka to Shikei: Oumu to Iu Tenkanten*, GENDAI SHISO, Mar. 2004, at 44, 44-55.

14. Members of Parliament who oppose capital punishment rarely tell their constituents. As of May 2003, 122 of the 762 Members of Parliament had joined the “Diet Members League for the Abolition of Capital Punishment” (a decline from the peak of nearly 200 some years earlier). Of these, “only two or three” tell voters their views on the death penalty; the rest fear being punished at the ballot box.¹⁹

15. Scholars and reporters are routinely denied access to death penalty documents – including trial records – that by law should be made public.²⁰ In Kitakyushu, for example, prosecutors refused a researcher’s request to read documents related to a case in which the defendant’s death sentence was finalized after he withdrew his right to appeal. Prosecutors claimed that providing the professor with copies of the documents would “hinder the administration of prosecution functions.”²¹ Withholding records discourages research and reporting about capital punishment.

16. The Japanese state tries to insulate capital punishment from international scrutiny. All of the practices described above serve this end, as do the state’s unwillingness to cooperate with interested foreign visitors and its refusal to sign international treaties and protocols related to the death penalty.²²

Although there are more bricks in Japan’s wall of silence,²³ the

¹⁹ Interviews with members of Parliament (Jan.- Feb. 2004); Yasuda, *supra* note 18, at 47.

²⁰ CODE OF CRIM. PROC., art. 53.

²¹ Shinichi Ishizuka, *Shikei Kiroku no Etsuran to Shimin no Shiru Kenri*, in SHIKEI SONCHI TO HAISHI NO DEAI 183-193 (Shikei Haishi Henshu Iinkai ed., 1997).

²² See SHIKEI HAISHI HENSHU IINKAI, SEKAI NO NAKA NO NIHON NO SHIKEI (2002).

²³ For example, capital defenders are often denied access to relevant case evidence, in part because their discovery rights are highly restricted, but also because “external checks on prosecutory power are almost non-existent.” Daniel H. Foote, *Nichibei Hikaku Keiji Shiho no Kogi o Furikaette*, 1148 JURISTO 165, 173 (1999). This leaves defense lawyers in the passive position of hoping that prosecutors will not withhold mitigating and exonerating evidence. Their hope is sometimes disappointed. The worst miscarriages in Japanese criminal justice occur when prosecutors withhold evidence from the defense. See CHALMERS JOHNSON,

foregoing summary does suggest its contours. The rest of this article proceeds from two premises: there is no government power greater than the power of life and death and no government intrusion more invasive than the death penalty, and there is no government power in greater need of public oversight. In Japan that oversight is missing. Moreover, if transparency and accountability are two hallmarks of a healthy democracy, then the secrecy that surrounds capital punishment seems decidedly undemocratic. Albert Camus believed that “Instead of saying that the death penalty is first of all necessary and then adding that it is better not to talk about it, it is essential to say what it really is and then say whether, being what it is, it is to be considered as necessary.”²⁴ State officials in Japan – and prosecutors in particular – practice a “better not to talk about it” strategy. The next section explores the historical origins of this policy, and the following two sections examine the justifications of secrecy that prosecutors provide and the meanings implied when the state kills in secret.

III. ORIGINS

The secrecy and silence that characterize capital punishment in Japan developed unevenly over the last century and a half. This section identifies three historical moments of special significance: the “birth of secrecy” during the first 15 years of the Meiji era (1867 - 1912); the creation and spread of “censored democracy” during the American Occupation (1945 - 1952); and the acceleration of silence in the decades that followed.

A. MEIJI BIRTH

Capital punishment in Japan was not always surrounded by so much secrecy. Indeed, throughout most of Japanese history, death was the main criminal sanction and was administered openly. Until

CONSPIRACY AT MATSUKAWA (1972); NOBUO KINOSHITA, SAIBANKAN NO HANZAI: “ENZAI” (2001); DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN (2002).

²⁴ ALBERT CAMUS, *Reflections on the Guillotine, in* RESISTANCE, REBELLION, AND DEATH 178 (1960).

the fourth century, when Chinese concepts of punishment began to influence Japan's legal system, law and morality were inseparable normative spheres, and perpetrators of many kinds were commonly executed in public.²⁵ The practice of capital punishment was interrupted when Japan became the world's first abolitionist nation in 810. For three-and-one-half centuries thereafter -- until 1156 -- the death penalty was defunct, a development that appears to have been rooted in two social facts: the peace that Japan enjoyed during the Heian era, and the flourishing of Buddhism which was introduced from China in 538.²⁶ Though the death penalty was never formally abolished during this period, death-eligible defendants were routinely exiled or given lesser punishments such as flogging, so Japan was "de facto" abolitionist.²⁷

Executions resumed in 1156 following a violent rebellion known as the *Hogen-no-Ran*. During the next seven centuries of samurai rule — from the beginning of the Kamakura period in the twelfth century until the Tokugawa era ended in 1867 -- capital punishment again became the sanction of choice. Almost all crimes, from petty larceny to murder, were punishable by death, and execution methods ranged from boiling, burning, and crucifixion to several levels of beheading.²⁸ As in colonial America, capital punishment in pre-modern Japan was more than just one penal technique among many, it was the "base point" from which other punishments deviated. Japanese officials used a variety of practices to "intensify" the punishment and thereby create "degrees of death."²⁹ Executions again became highly public affairs, both in order to maximize deterrence and in order to demonstrate and celebrate the

²⁵ KAORU MURANO, *NIHON NO SHIKAI* 40 (1992).

²⁶ Shigemitsu Dando, *Toward the Abolition of the Death Penalty*, 72 IND. L.J. 7, 7 (1996).

²⁷ PETRA SCHMIDT, *CAPITAL PUNISHMENT IN JAPAN* 11 (2002). There is, however, some evidence that Buddhist rulers in India may have abolished capital punishment before Japan did so in the Heian period. Moreover, some analysts suggest that in 724 AD, seventy years before the Heian era began, Japan's Emperor Shomu, a devout Buddhist, forbade the use of capital punishment. Damien P. Horigan, *Of Compassion and Capital Punishment: A Buddhist Perspective on the Death Penalty*, 41 AM. J. OF JURIS. 271, 283-285 (1996).

²⁸ See TAKEO ONO, *EDO NO KEIBATSU FUZOKUSHI* (1963).

²⁹ BANNER, *supra* note 6, at 53.

“sovereignty” of the ruling authorities.³⁰

In 1600, when Englishmen sailed into Japan searching for gold and trade, the foreigners were alarmed and appalled by the corpses they encountered along the Tokaido road connecting Tokyo to Kyoto. They were the remains of crucified criminals. The diary of one English captain refers to bodies which after execution had been hewn “into pieces as small as a man’s hand” by the swords of passers-by.³¹ By 1637, the shogun had expelled all foreigners from the country except for a small group of Dutchman confined to an island off the coast of Nagasaki. Over the next 230 years of Tokugawa history, countless Christians were publicly tortured and killed by agents of a government that feared their “destabilizing” influence. From 1614 to 1640, for example, at least five thousand Christians were publicly executed, many through methods such as *ana-tsurushi*, or “hanging upside-down in pits” that contained excreta and other filth.³²

Executions declined in number during the 18th century, but since criminals could only be sentenced after a confession, coercion was institutionalized as a means of obtaining the requisite evidence³³ – much as had been done in medieval Europe.³⁴ While the public was informed of laws and orders, they were told little about punishments because of the Confucian belief that too much knowledge might encourage the calculators. Punishments were still administered in public, however, and this plus their elaborated cruelty “served the purpose of general prevention.”³⁵

When the Tokugawa period ended in 1867 and Imperial rule was restored, Meiji reformers realized the need to modernize all

³⁰ DANIEL BOTSMAN, *PUNISHMENT AND POWER IN THE MAKING OF MODERN JAPAN* 25 (2004).

³¹ GILES MILTON, *SAMURAI WILLIAM: THE ENGLISHMAN WHO OPENED JAPAN* 180 (2003).

³² William Johnston, *Translator’s Preface*, in SHUSAKU ENDO, *SILENCE* 8 (1966).

³³ SCHMIDT, *supra* note 27, at 18, *citing* BOTSMAN, *supra* note 30, at 35.

³⁴ John Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

³⁵ SCHMIDT, *supra* note 27, at 18.

aspects of Japanese society, including penal practices. Corporal punishments were eliminated, status-based distinctions were removed, mandatory death sentences were all but eradicated, barbarisms were banned, and hanging became the only way the state could administer death. By 1882, executions had to be carried out inside prison grounds, and prison guards and other state officials were the only persons permitted to be present. For the first time in Japanese history, the principle of secrecy had been laid down in law. In 1908, Japan enacted a Penal Code that is, for the most part, still in force today. Hanging remains the sole means of execution (Article 11), and the state's "officials only" attendance policy has not been altered. During the long Pacific War (1931 - 1945), capital punishment "flourished."³⁶ Murders declined (as they usually do when young males are sent abroad), so the number of executions remained relatively flat, but the number of capital offenses increased, and the wartime spirit of "giving all for the Emperor" muffled calls for abolition and reform that had been common in the preceding years.³⁷

In comparative perspective, the transformation of capital punishment occurred much faster in Japan than it did in Western countries that experienced similar shifts from high to low usage, public to private executions, and "barbaric" to "civilized" methods of state-killing. A process that took a few years in Japan lasted centuries elsewhere.³⁸ Since the death penalty in some societies has deep cultural roots,³⁹ the concentrated nature of the Japanese changes might seem to create the possibility for reversion to public "spectacles of suffering" that had prevailed for centuries. That is not what happened. Rather, the Japanese state held fast to the Western standards it adopted and adapted, in large part because that is what it felt it needed to do in order to earn the recognition and respect of "the

³⁶ *Id.* at 29

³⁷ Yasuda, *supra* note 18, at 45.

³⁸ See BANNER, *supra* note 6; RICHARD J. EVANS, *RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY, 1600-1987* (1996); PIETER SPIERENBURG, *THE SPECTACLE OF SUFFERING: EXECUTIONS AND THE EVOLUTION OF REPRESSION* (1984); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977).

³⁹ ZIMRING, *supra* note 3. *But see also* David Garland, *Capital Punishment and American Culture*, 7 *PUNISHMENT & SOC.* 347.

civilized world” that was then colonizing Asia.⁴⁰ Here as on many other occasions in its modern history, Japan was “invented” through its encounters with the West.⁴¹

B. THE OCCUPATION’S “CENSORED DEMOCRACY”

During the seven-year Occupation of Japan that followed its defeat in 1945, death sentences and executions spiked. This was not so much because of a punitive turn in criminal justice policy as it was the result of a steep increase in the number of homicides.⁴² In the aftermath of “total war,” millions of males returned to Japan, and the “exhaustion and despair” that overwhelmed many people helped spread a variety of social problems, from alcoholism and drug addiction to corruption and crime of various kinds.

General Douglas MacArthur, the Supreme Commander for the Allied Powers (SCAP) who governed Japan for the first six years of this period, regarded his host country differently than did his Occupation counterparts in defeated Germany. For him and for the other American men who ruled, “demilitarizing and democratizing” a pagan, “Oriental” society was unequivocally “a Christian mission.”⁴³ MacArthur and many of the “old Japan hands” who had spent their professional lives studying the country belittled the capacity of ordinary Japanese to govern themselves. So did Yoshida Shigeru, Japan’s most powerful post-Occupation politician. When MacArthur left Japan for good in April 1951, at least 200,000 people lined the streets of Tokyo to bid him adieu, some with tears in their eyes. Upon his arrival in the United States, the General told a Senate committee that “measured by the standards of modern civilization, [the Japanese] would be like a boy of 12 compared with our [American] development of 45 years.”⁴⁴ Though this phrase struck many

⁴⁰ See BOTSCHAN, *supra* note 30.

⁴¹ See IAN BURUMA, *INVENTING JAPAN, 1853-1964* (2003).

⁴² MANABU MIYAZAKI & AKIHIRO OTANI, *SATSUJINRITSU: NIHONJIN WA SATSUKIN GA DEKINAI! SEKAI SAITEI SATSUKINRITSU NO NAZO* 21 (2004).

⁴³ JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 23 (1999).

⁴⁴ *Id.* at 549.

Japanese like a slap in the face, the truth is that they, too, routinely spoke of themselves as “MacArthur’s children.”⁴⁵ Indeed, the entire Occupation was premised on Japan’s acquiescence to America’s overwhelming authority. That authority forged many enduring features of Japan’s postwar polity, three of which are especially relevant here: the decision to retain the death penalty; the capital punishment precedents of the Tokyo War Crimes Trial; and the legacies of the “censored democracy” that prevailed during the Occupation period.

First, Occupation authorities could have abolished the death penalty in Japan, and their decision not to was neither natural nor inevitable. Indeed, the Occupation’s “democratizing” agenda was highly ambitious: land redistribution, equality of the sexes, the downsizing of the emperor from “god” to a mere “symbol of the State and of the unity of the people,” the establishment of the Diet as the highest organ of state power, the power of judicial review, the renunciation of war, the creation of due process rights, and so on. But the abolition of capital punishment was nowhere on the agenda. This not only distinguishes the Occupation of Japan from the parallel Occupation of Germany,⁴⁶ it also helps explain why Japan today is one of only two developed democracies that still practice capital punishment.

Second, abolition never occurred in large part because American officials were determined to put “war criminals” to death in the Tokyo War Crimes Trial. The “main trial” was actually one of many. Altogether, some 5700 Japanese were tried on “war crimes” charges, of whom 920 were executed.⁴⁷ In the main tribunal initiated by SCAP in Tokyo, 28 defendants were tried and 25 convicted (of the remaining three, two died during trial and one was deemed psychologically unfit to be adjudicated). No one was acquitted. (In Nuremburg, three of the 22 defendants were found not guilty). Seven of the 25 convicts were executed on 23 December 1948, just seven

⁴⁵ *Id.* at 551.

⁴⁶ EVANS, *supra* note 38, at 741.

⁴⁷ By country, the number of war-crime death sentences was as follows: Dutch 236, British 223, Australian 153, Chinese 149, American 140, French 26, and Filipino 17. In addition, “the Soviets may have executed as many as three thousand Japanese as war criminals, following summary proceedings.” DOWER, *supra* note 43, at 447, 449.

weeks after the Tokyo court's 11-judge bench had sentenced them to death and just three days after the U.S. Supreme Court rejected the defendants' appeal on the grounds that it had no jurisdiction in the case. Before he was hanged, Hideki Tojo, who was both Prime Minister and War Minister at the time of Pearl Harbor, said that "this trial was a political trial. It was only victors' justice."⁴⁸ Much subsequent scholarship argues that this is an accurate assessment.⁴⁹

The Tokyo Trial was flawed in numerous ways. None of the judges was from a neutral nation, and only one came from a country (India) that had not suffered directly and severely from Japanese acts in the war. At least five judges had prior involvement in the issues to come before the tribunal, including an American judge who was an Army Major General and a Filipino justice who had survived the Bataan Death March. Notably, no Koreans or Japanese served as judge or prosecutor, and the death sentence votes in all of the capital cases were either 6 to 5 or 7 to 4 (four defendants escaped death by a single vote). At Nuremburg, by contrast, verdicts and sentences required the approval of three of the four sitting justices. Had the voting rule been similar in Tokyo, there would have been no capital convictions. A 6-5 vote also determined the method of death, which was hanging. Richard Minear, who has written the classic account of the trial, believes the other option under consideration (firing squad) may have been deemed "too dignified" for Japanese defendants.⁵⁰

All of the defendants at the Tokyo Trial were Japanese. Considering the fire bombings of Tokyo and the atomic bombs at Hiroshima and Nagasaki, there is room to wonder whether war crimes in the Pacific were the exclusive preserve of America's enemy. The

⁴⁸ Tojo was the only defendant to implicate the Emperor, which he did by testifying that "it was inconceivable for him or any subject to have taken action contrary to the emperor's wishes." In response to this defense, Prosecutor Keenan and Occupation officials pressured other Japanese defendants to urge Tojo to rectify his reply. One week later he retracted the statement. *Id.* at 468.

⁴⁹ See RICHARD H. MINEAR, *VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971); ARNOLD BRACKMAN, *THE OTHER NUREMBURG: THE UNTOLD STORY OF THE TOKYO WAR CRIME TRIALS* (1988); DOWER, *supra* note 43; HERBERT P. BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN* (2000); TIMOTHY P. MAGA, *JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS* (2001); Kentaro Awaya, *The Tokyo Tribunal, War Responsibility and the Japanese People*, JAPAN FOCUS (Timothy Amos tr.), JapanFocus.org (February 6, 2006).

⁵⁰ MINEAR, *Id.* at 91.

selection of Japanese to put on trial was arbitrary in the extreme. Most conspicuously, Emperor Hirohito was nowhere to be found in the indictments – and not because he lacked culpability. History shows that Hirohito was hardly the reluctant, passive, wartime monarch that SCAP, Japan, and the emperor himself presented for public consumption. He was, rather, “a man of strong will and real authority”⁵¹ who “bore enormous responsibility for the consequences of his actions in each of his many roles. Yet, he never assumed responsibility for what happened to the Japanese and Asian peoples whose lives were destroyed or harmed by his rule.”⁵² If anyone deserved to be on trial on Tokyo, this was the man.⁵³ SCAP, however, made a calculated decision to preserve the person and institution of the emperor in the belief that their continuation would facilitate governing Japan and out of fear that trying and executing Hirohito could create lasting resentment among the Japanese. MacArthur’s chief of psychological warfare operations even suggested that trying the emperor would be “blasphemous.” In some respects, the Occupation decision to separate Hirohito and the military leadership proved remarkably effective. Postwar Japan is much richer, freer, and more egalitarian than imperial Japan ever was. On the other hand, since the emperor’s role in the war was never seriously investigated, justice was rendered so arbitrary that the Tokyo Trial has been called “an exercise in revenge,” “the worst hypocrisy in recorded history,” and “a white man’s tribunal.”⁵⁴

As for the legal process itself, Chief Prosecutor Joseph Keenan predicted on the eve of the trial that “in this very courtroom will be made manifest to the Japanese people themselves the elements of a fair trial which, we dare say, perhaps they may not have enjoyed in the fullness – in all of their past history.”⁵⁵ What ensued was anything but. For one thing, the tribunal was not bound by “technical rules of evidence,” and this proved to be a gateway through which much unfairness entered the proceedings. Among other problems,

⁵¹ BIX, *supra* note 49, inside cover.

⁵² *The Emperor, Modern Japan and the U.S.-Japan Relationship: an Interview with Herbert Bix*, at <http://japanfocus.org/article.asp?id=376>.

⁵³ DOWER, *supra* note 43, at 277.

⁵⁴ *Id.* at 469.

⁵⁵ MINEAR, *supra* note 49, at 74.

press releases from the prosecution were accepted as evidence, and there was even “a conversation with a person since deceased” that the court took into account.⁵⁶ Conversely, reams of relevant evidence was excluded, including materials describing the conditions in China prior to the time Japanese forces invaded, evidence about America’s A-Bomb decisions, and other information the defense wanted the court to consider. American control of prosecution policy also bordered on the absolute, with the main aim of insulating the emperor from accountability.⁵⁷ Judges were frequently absent from trial (one missed 22 consecutive days), and the whole panel of judges never even met together to discuss their final judgment.⁵⁸ In the context of criminal justice, “truth” has been defined as “accurate accounts by competent people of what they genuinely believe they recall from sensory experience” and the “honest production of papers and objects relevant to legal controversies.”⁵⁹ By this definition, the Tokyo Trial produced little truth.

In the end, MacArthur could have commuted any or all of the convictions. He chose not to. After a cursory review of the tribunal’s proceedings, he directed an American general to “execute the sentences as pronounced,” and he went on to implore “Divine Providence” to “use this tragic expiation as a symbol to summon all persons of good will to the realization of the utter futility of war.”⁶⁰ When the seven condemned men were hanged two days before Christmas in 1948, they were required to wear United States army salvage work clothing rather than their old uniforms or civilian clothes of their own choosing.⁶¹ Of the eighteen defendants sentenced to prison, six died there; the rest were paroled or released after their sentences were reduced (the last in 1958). Many of them were “woefully wronged” by a “highly defective” trial.⁶² Since they were

⁵⁶ *Id.* at 120.

⁵⁷ DOWER, *supra* note 43, at 458.

⁵⁸ *Id.* at 465.

⁵⁹ MARVIN E. FRANKEL, *PARTISAN JUSTICE: TOO MUCH FIGHT? TOO LITTLE TRUTH? EQUAL JUSTICE?* 73 (1978).

⁶⁰ MINEAR, *supra* note 49, at 167.

⁶¹ *Id.* at 172.

⁶² *Id.* at 177.

the leaders of Japan and indicted as its representatives, the nation, too, was dishonored.

Although much has been written about the Tokyo Trials, the tomes do not answer many basic questions. How were established principles of law reversed after Japan surrendered? On what basis were the 28 unlucky defendants selected from a vastly larger pool of possibilities? Why was the emperor invisible throughout the legal proceedings? Why was the tribunal's voting rule tilted in favor of conviction? Why were the normal rules of evidence undermined and ignored? Why were the opinions of dissenting judges buried in huge files? Why did the Occupation authorities block publication of Indian Justice Radhabinod Pal's stinging dissent? And most importantly, why has the record of the Tokyo War Crimes Trial never been published *in toto*?⁶³ While the Nuremburg proceedings have been made available in a 42-volume set, no official publication ever emerged from Tokyo. As John Dower's magnificent study of the Occupation concludes, "for all practical purposes, the record of the [Tokyo] proceedings was buried."⁶⁴ Not even the majority judgment has been made readily accessible.⁶⁵

Third and finally, though the secrecy that shrouds the Tokyo Trial has an obvious affinity with the secrecy that surrounds capital punishment in contemporary Japan, the legacies of the Occupation's policy of "censored democracy" are broader than that. Much that lies at the heart of contemporary Japan "derives from the complexity of the interplay between the victors and the vanquished" during the Occupation.⁶⁶ For this study of the death penalty, the most salient feature of that interplay was a censorship bureaucracy, 6000 persons strong, that extended into most aspects of public expression. Censorship applied to all forms of media, from newspapers, magazines, and books to radio, film, and theatre, and the policy itself was often opaque because the lines between permissible and

⁶³ *Id.* at 33.

⁶⁴ DOWER, *supra* note 43, at 454.

⁶⁵ Two English-language sources for the Tokyo Trial are JOHN R. PRITCHARD, *THE TOKYO MAJOR WAR CRIMES TRIAL: THE RECORDS OF THE INTERNATIONAL MILITARY TRIBUNAL OF THE FAR EAST, WITH AN AUTHORITATIVE COMMENTARY AND COMPREHENSIVE GUIDE* (1998) and JEANIE M. WELCH, *THE TOKYO TRIAL: A BIBLIOGRAPHIC GUIDE TO ENGLISH-LANGUAGE SOURCES* (2001).

⁶⁶ DOWER, *supra* note 43, at 28.

impermissible discourse were never made public. The secrecy of the standards fostered a “pathology of self-censorship,” a problem that persists in Japan to this day.⁶⁷ At one point during the Occupation, more than 60 topics were considered taboo, including criticism of SCAP or of any of its policies, mention of SCAP’s role in writing the new Constitution, and public justification or defense of any of the defendants in the Tokyo War Crimes Trial. Since the taboos included public acknowledgement of the existence of censorship, SCAP remained “beyond accountability” for the duration of the Occupation.⁶⁸ Only after the American authorities left in 1952 did it become possible to discuss forbidden subjects (such as abolition of capital punishment) and the Occupation more generally.⁶⁹ By then, seven years of censored democracy had helped forge a postwar political consciousness that to this day remains inclined to “acquiesce to overweening power,” “conform to a dictated consensus,” and accept authority “fatalistically.”⁷⁰ Though these habits of the heart

⁶⁷ See LAURIE A. FREEMAN, *CLOSING THE SHOP: INFORMATION CARTELS AND JAPAN’S MASS MEDIA* (2000).

⁶⁸ DOWER, *supra* note 43, at 412. In Okinawa, censorship lasted until 1955. While the United States built this prefecture into a major Cold War military base, no news reports or commentaries were published in the Japanese press. *Id.* at 434.

⁶⁹ In 1956 there were two days of discussion in the Diet about a bill to abolish capital punishment, but it died in the next Diet session. SHIKI HAISHI HENSHU INKAI, *supra* note 2, at 1. No subsequent Parliament seriously considered abolition until progressives tried to introduce a “life-without-parole and moratorium” bill in 2003. It failed in the face of conservative opposition led by prosecutor-turned-Parliamentarian Tomoko Sasaki. Interviews with members of Parliament, *supra* note 19.

⁷⁰ DOWER, *supra* note 43, at 439. Tomoko Matsushima, who interviewed homeless people in the USA and Japan, notes that the homeless in Manhattan frequently channel their anger into “criticism of the policies of city authorities, the economic situation and other targets” such as the mayor or the market. Tomoko Matsushima, *Society Should Be Kinder to the Homeless*, ASAHI SHIMBUN, August 20, 2004. In contrast, “not one homeless person [in Tokyo] ever complained to [her] about politics, the recession, society or other contemporary issues.” Matsushima says she cannot explain the silence of her Tokyo informants, but research suggests it may be one piece of a larger pattern of passive political consciousness. DOWER, *supra* note 43; see also ATSUO ITO, SEIJI NO SUJI (2005); SHELDON GARON, *MOLDING JAPANESE MINDS: THE STATE IN EVERYDAY LIFE* (1997); DAIKICHI IROKAWA, *THE AGE OF HIROHITO: IN SEARCH OF MODERN JAPAN* (Mikiso Hane & John K. Urda trans., 1995). In recent years, signs of a more

have come to be considered “peculiarly Japanese,” they are in large part legacies of the American Occupation.⁷¹ What SCAP bequeathed – retention of capital punishment, the Tokyo Trial precedents, and a political consciousness that seems uncommonly comfortable with the silences dictated by “censored democracy” – helps explain why Japan’s subsequent death penalty policy encountered little resistance.⁷²

C. POSTWAR ACCELERATION

For more than a decade after the Occupation ended in 1952, death row inmates in Japan were notified a day or two in advance of their execution date and given the opportunity to arrange final meetings with family and friends, to worship in a group with other inmates, to receive spiritual counseling, to request last meals, and to otherwise put their final affairs in order.⁷³ Until 1975, the condemned were allowed to play softball together and to talk with inmates in adjacent cells.⁷⁴ These freedoms no longer exist. Viewings of the gallows have also been banned and visits to death row curtailed. Hideo Itazu, a prison guard in Nagoya from 1948 to 1963, says that when he was a prison official, the Ministry of Justice held debates about capital punishment and published abolitionist articles in its own

vigorous “civil society” can be seen in some segments of Japanese society. *THE STATE OF CIVIL SOCIETY IN JAPAN* (Frank J. Schwartz & Susan J. Pharr eds., 2003).

⁷¹ DOWER, *supra* note 43, at 440.

⁷² Many Japanese journalists also illustrate these tendencies toward fatalism and acquiescence to power. I interviewed ten reporters, all of whom covered criminal justice. Few expressed interest in attending executions or in expanding the circle of persons who can attend, and most knew little about the state’s secrecy policy. Though there are institutional and structural causes of these dispositions (such as “press clubs” that discourage competition and encourage reliance on official sources of information), elite Japanese journalists also possess different sensibilities about their “proper role” compared with journalists in other rich democracies. See FREEMAN, *supra* note 67; HARA, *supra* note 11; MARK D. WEST, *SCANDAL NATIONS: JAPAN AND AMERICA* (forthcoming).

⁷³ MURANO, *supra* note 25, at 15.

⁷⁴ Ryan Connell, *Life on Death Row Hangs by a Thread*, MAINICHI DAILY NEWS, Dec. 28, 2002.

house journal.⁷⁵ Forty years after Itazu retired, prosecutors acknowledge that such practices are today “utterly unimaginable.”⁷⁶ More generally, Japan’s government, and prosecutors in particular, have become increasingly unwilling to describe, explain, justify, or discuss a wide range of death penalty policies and practices. At one level, this postwar acceleration of secrecy is a puzzle because it contradicts a trend towards more openness and accountability in some other spheres of Japanese governance.⁷⁷ At a deeper level, however, insulating a practice with secrecy and silence is a common reaction to threat. As the sociologist Georg Simmel put it, “The flight into secrecy is a ready device for social endeavors and forces that are about to be replaced by new ones.”⁷⁸ Japan’s postwar acceleration of secrecy reflects the kind of anxiety Simmel had in mind, and this section summarizes some of the forces that have quickened the Justice Ministry’s “flight.”

In the first place, the death penalty in Japan is used much more sparingly than it used to be, with executions falling from an average of 800 per year during the first five years of the Meiji era (1868 - 1872) to an average of 18 per year during the first five years of the Showa period (1926 - 1930) – a 98 percent drop in just 58 years. As explained earlier, executions remained flat during the Pacific War (1931 - 1945) and Occupation (1945 - 1952), but they declined thereafter, from an annual average of 24.6 in the 1950s, to 13.2 in the 1960s, 9.4 in the 1970s, and just 1.5 in the 1980s. Death sentences fell as well, from an annual average of 24.2 in the 1950s, to 15.1 in the 1960s, 5.0 in the 1970s, and 4.1 in the 1980s.⁷⁹ Then, for the 40 months from November 1989 to March 1993, the Japanese state executed no one because four successive Ministers of Justice refused to sign (or had no opportunity to sign) the requisite death warrants.⁸⁰

⁷⁵ Hideo Itazu, *Jo ga Utsutte ne, Honto ni Tsurai Desu yo*, 14 FORUM 90 1-2, June 1991.

⁷⁶ Interviews with prosecutors in Japan (Mar. 2004).

⁷⁷ Jonathan Marshall, *Here Comes the Judge: Freedom of Information and Litigating for Governmental Accountability*, 23 SOC. SCI. JAPAN 8, Apr. 2002.

⁷⁸ THE SOCIOLOGY OF GEORG SIMMEL, *supra* note 1, at 347.

⁷⁹ MURANO, *supra* note 25, at 53.

⁸⁰ HARA, *supra* note 11.